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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. .....

OHIO WATER SERVICE COMPANY,
Petitioner,

vs.

THE MAHONING VALLEY SANITARY DISTRICT,
Respondent.

(Two Cases)

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

To the Honorable Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Ohio

entered in the above-entitled cases (consolidated for hearing)[1] on March 31, 1954.

OPINIONS BELOW.

The opinion of the Ohio Supreme Court in this case is reported at 161 O. S. 259, and is set forth at page 68a. The opinion of the Ohio Court of Appeals is set forth at page 58a. The opinion of the trial court, which was a special statutory common pleas court having jurisdiction over The Mahoning Valley Sanitary District, is set forth at page 9a.

JURISDICTION.

The judgment of the Supreme Court of Ohio was entered on March 31, 1954. Application for rehearing, filed pursuant to the rules of the Supreme Court of Ohio, was denied without opinion on April 21, 1954.

The jurisdiction of this court is invoked under Title 28 USC Sections 1257 and 2101.

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[1] Both cases Nos. 33688 and 33689 on the docket of the Ohio Supreme Court involve the same questions of facts and law and have been treated as consolidated cases in every court which considered them. They are maintained as separate cases because No. 33688 is an appeal from a final order entered by the special common pleas court on September 29, 1952, approving and confirming the Board of Appraisers' report, and No. 33689 is an appeal from a final order entered on March 19, 1953, after the first order had purportedly been vacated by that court. Since the cases are in every other pertinent aspect identical and since the question of vacation of the first order and entry of the second order is not at issue here, petitioner has prepared this petition and the accompanying appendix as though only a single cause were presented.

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QUESTIONS PRESENTED.

Two questions are presented:

1. Whether petitioner has been denied the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States by certain sections of the Ohio Sanitary District Act which, as construed by the Supreme Court of Ohio, prohibit an appeal by petitioner from a judgment of the trial court which subjects petitioner's property to a proposed sanitary-district assessment, but specifically allow an appeal by the officials of the sanitary district from such judgment?

2. Whether the assessment of the total cost of a public improvement against only a portion of the property which the trial court recognized would be benefited thereby, in violation of a clear statutory mandate that all property benefited be assessed in proportion to the benefit received, deprives petitioner, a property owner who is thus assessed, of its property without just compensation and is a denial of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States?

STATUTES INVOLVED.

The federal constitutional provision involved in this petition is as follows:

Amendment XIV.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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A portion of Article IV, Section 2 of the Constitution of Ohio is involved in this petition and is set forth at page 94a.

Statutes involved in this petition are as follows: Ohio General Code Sections 6602-41, 6602-58, 6602-60, 6602-64, 6602-65, 6602-69, 6602-70, 6602-77 and 12223-29.[2]

These sections being lengthy, are set forth in full beginning at page 94a.

STATEMENT OF THE CASE.

Petitioner is the owner of real property situated within the boundaries of The Mahoning Valley Sanitary District, the respondent herein. Respondent is a sanitary district formed under the Sanitary District Act of Ohio and consists geographically of the areas within the territorial limits of the cities of Youngstown and Niles, Ohio.

The Mahoning Valley Sanitary District (hereinafter called simply the "District") was organized for the purpose of supplying water to the cities of Youngstown and Niles and still sells all of its water to them. Such supply of water has been and is now in excess of the amounts needed to supply the needs of these cities and for many years these cities have been reselling to suburban townships and communities a substantial portion of the water which they receive from the District. (91a, 92a) This re-

[2] The General Code of Ohio was repealed and replaced by the Revised Code of Ohio effective October 1, 1953. This re-enactment of the Ohio statutes was not intended to change the law as set forth in the General Code, but only to recodify it. Since this cause arose during the time when the General Code was in force and since the pleadings and opinions in the lower courts refer to that code, such reference has been continued throughout this petition. Cross reference is made in the appendix between all General Code and Revised Code section numbers here involved.

sale of water to outlying areas has been a major contributing cause of the exhaustion of the District's former water surplus.

Realizing that these outlying areas were dependent upon the District's facilities for their water supply, the District, in 1949, decided to undertake a six million dollar expansion program, which will greatly increase the supply of available water. This litigation arose over the question of whether such benefited outlying areas should be assessed to pay the cost of such improvement in proportion to the special benefits received by them.

Pursuant to the provisions of the Sanitary District Act, the board of directors of a district, by whom it is managed and administered, determines the need for additional facilities and the probable cost thereof. (Ohio General Code Sec. 6602-69, p. 97a) The act further provides that such cost is to be assessed by the board of directors against all real property which will benefit from such facilities, whether within or without the district, on the basis of an appraisal of benefits prepared by appraisers and confirmed by a special common pleas court (Ohio General Code Sec. 6602-77, p. 100a) which is invested with jurisdiction, judicial and otherwise, over matters pertaining to the district. If any property owner is dissatisfied with the appraisal of benefits to his land, he may file written exceptions thereto (Ohio General Code Sec. 6602-64, p. 96a) which are heard and determined by this special court in connection with its consideration of the appraisal of benefits. (Ohio General Code Sec. 6602-65, p. 97a)

In this cause, notwithstanding the direct and unambiguous statutory requirements that the benefits accruing to lands outside the District must be appraised for assessment purposes (Ohio General Code Sec. 6602-60, p. 96a), the ap-

praisers, although conceding that such lands were benefited (2a), refused to appraise them and recommended that the entire cost of the proposed improvement be assessed against the property located within the District. (2a) Petitioner, and certain other property owners, filed timely exceptions to the appraisers' report (5a), on the ground that, by statute (Ohio General Code. Sec. 6602-60, p. 96a), lands outside the District, having a tax valuation of seventy million dollars (93a), which would benefit greatly from construction of the additional facilities, must be appraised so that they might be assessed for their fair shares of the cost of the improvement. At a hearing before the special common pleas court, petitioner argued that approval of the arbitrary action of the appraisers would result in an unconstitutional taking of property without due process of law and would be a denial of the equal protection of the laws, in violation of the Fourteenth Amendment of the Constitution to the United States. The trial court overruled petitioner's exceptions (16a, 17a, 41a), refused to order the board of appraisers' report amended so as to conform to the provisions of the Sanitary District Act and the United States Constitution, and approved the report. (20a, 21a, 34a, 44a)

Petitioner duly filed a motion for new trial (28a), in conformance with the Ohio practice, in which it again raised the federal question referred to in the paragraph above. In support of its motion, and in compliance with the rules of practice of the trial court, a brief was filed with the motion (30a), wherein petitioner argued that the court's decision violated the Fourteenth Amendment to the Federal Constitution. (33a) Petitioner's motion for new trial was overruled (35a) and, by that act, the trial court necessarily considered and ruled on the federal question raised therein.

An appeal was taken to the Court of Appeals of Mahoning County (55a), one of the errors assigned being the above-mentioned federal question. (56a, 58a) After argument on the merits, the appellate court dismissed petitioner's appeal on the ground that no right of appeal existed from the decision of the trial court. (60a, 61a)

Petitioner then filed an appeal as of right before the Ohio Supreme Court (62a), assigning as one of the errors in the court below that petitioner had been denied due process of law and equal protection of the law (65a, 67a), as guaranteed by the Fourteenth Amendment to the Federal Constitution. While the assignments of error did not make specific reference to the Fourteenth Amendment, the words thereof were used, such words are not used in the Ohio Constitution, and an assignment so worded before the Supreme Court of Ohio has been held sufficient to raise a federal question under the Fourteenth Amendment so as to permit review by this honorable court. **Copperweld Steel Company v. Industrial Commission of Ohio**, 324 US 780, 89 L ed 1363, 65 S Ct 1006 (1945). In accordance with Ohio practice, a motion praying that the Supreme Court have certified to it the record of the court of appeals was filed simultaneously. (63a) The Supreme Court of Ohio sustained the motion to certify (88a), but dismissed the appeal as of right on the ground that no debatable constitutional question was involved. (90a) By such dismissal, the Supreme Court of necessity considered both the federal and the state constitutional questions, in accordance with the requirements of the Constitution (94a) and statutes (Ohio General Code Sec. 12223-29, p. 100a) of the State of Ohio. After extensive briefs were filed and oral argument was had, the Supreme Court affirmed the decision of the court of appeals (90a), holding, in a novel and sur-

prising decision, that while neither petitioner nor any other property owner could appeal from the decision of the trial court, the board of directors of the District had a right of appeal from **any** order of such court because of a specific grant contained in the Sanitary District Act. (77a)

This decision created an additional federal question as to whether the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States was denied petitioner by the grant of a unilateral right of appeal to the District, through its board of directors, while denying such right of appeal to all other affected persons. Since the holding by the Supreme Court was not based on arguments presented to it by either petitioner or the District, who were the parties to this cause, and since such holding could not in any way have been anticipated from any prior decision of the courts of Ohio or the federal courts, petitioner was first able to raise such federal question by filing an application for rehearing of this cause on that specific point before the Supreme Court of Ohio (78a) within the time permitted by its rules of practice. Petitioner's application set out in detail the federal question involved. The Supreme Court of Ohio denied petitioner's application without granting a hearing thereon. (91a)

REASONS FOR GRANTING THE WRIT.

The Supreme Court of Ohio, in its decision in this cause (68a), held that an order of the special common pleas court overruling property owners' exceptions to the appraisal of benefits accruing to their properties is "final and incontestable," in the sense that they have no right to appeal therefrom (74a, 75a), whereas it further held that the District itself, acting through its board of directors, has a

statutory right (Ohio General Code Sec. 6602-70, p. 99a) of appeal from such an order. (77a) By thus construing the Sanitary District Act, the Ohio Supreme Court denied to petitioner the equal protection of the laws guaranteed by the Fourteenth Amendment to the Federal Constitution.

While reasonable classification is permitted without doing violence to the equal-protection-of-the-laws doctrine, "such classification must be based on some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which classification is imposed; and classification cannot be arbitrarily made without any substantial basis." **Southern Railway Company v. Greene,** 216 US 400, 417, 54 L ed 536, 541, 30 S Ct 287, 291 (1910). The Ohio Supreme Court, in stating the basis of its decision, did not claim that any classification existed which might excuse the statutory discrimination between the board of directors and the property owners within the District. Nor can any such classification be supported. To illustrate, a statute permitting public utilities to appeal condemnation awards which are conclusively binding upon the persons whose lands are affected would surely be stricken down as flaunting the constitutional prohibition against unequal protection of the laws. We submit that no sound distinction can be drawn between that situation and the one for which a review is sought here.

The question of the constitutionality of a unilateral right of appeal, whether on the basis of proper classification or otherwise, has never been decided by this court. This issue is squarely presented on the facts in this cause. In **Missouri v. Lewis,** 101 US 22, 31, 25 L ed 989, 992 (1880) this court pointed out, in discussing the equal-protection-of-the-laws clause of the Fourteenth Amendment, that "It means that no person or class of persons shall be denied the same

protection of the laws which is enjoyed by any other person or other classes in the same place and under like circumstances." Clear indication that any arbitrary discrimination between parties as to appeal is unconstitutional is also found in **Truax v. Corrigan**, 257 US 312, 66 L ed 254, 42 S Ct 124 (1921). That case cited with approval a decision of the Supreme Court of Illinois which struck down a statutory attempt to grant a unilateral right of appeal to the managers of a drainage district under facts almost identical with those presented here. **Funkhouser et al. v. Randolph et al.**, 287 Ill 94, 122 NE 144 (1919). The State of Wisconsin is the only other jurisdiction that petitioner has been able to discover whose highest court was faced with the direct question here presented. In **State ex rel. Owen v. Wisconsin-Minnesota Light and Power Company**, 165 Wis 430, 433, 162 NW 433, 434 (1917), the Supreme Court of Wisconsin held unconstitutional a statute granting a right of appeal from the orders of the railroad commission to certain public and semi-public bodies and parties but denying that right to all other parties adversely affected by the orders of the commission, saying:

> "Here the defendant is not only denied due process of law but it is denied the equal protection of the law inasmuch as the statute gives the right of appeal to certain specified parties and denys it to others without any apparent valid basis for such classification."

This language applies directly to the issue here presented. In both the Illinois and Wisconsin cases, the courts based their conclusions on a violation of the Federal Constitution.

Special circumstances may warrant granting a property owner or private person a right of appeal where the adversary party, a public body or public official, is denied such right, as the guarantees of the Fourteenth Amendment to

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the Constitution of the United States do not apply to public bodies or public officials. **Williams v. Baltimore**, 289 US 36, 77 L ed 1015, 53 S Ct 431 (1933). But no decision has been discovered where an appeal has been allowed to a public body or public official, but denied to a private person in a cause where their interests are adverse. Equality is not achieved in controversies between public authorities and private persons if the public authority may resort to the higher courts for redress of errors by the lower court, but the private person must accept as final the decision of the lower court.

Equal protection of the laws in the form of an equal right of appeal is particularly vital in this cause. The special common pleas court, which sits as the trial court, the board of directors, and the appraisers are all creatures of the Sanitary District Act and their activities and relationships to each other form a closed circle. Upon organization of the district, the court appoints the board of directors (Ohio General Code Sec. 6602-41, p. 94a), and, upon the recommendation of the board of directors, the court also appoints the appraisers. (Ohio General Code Sec. 6602-58, p. 95a) When the board of directors initiates any plan for an improvement of the district, the court, after approving the plan, instructs the appraisers to appraise benefits to all lands within and without the district that will be affected by such improvement. (Ohio General Code Sec. 6602-58, p. 95a) In examining the report of these appraisers, the court is not limited to hearing exceptions by persons affected, and approving or disapproving such report, but is empowered to return the report to the appraisers for revision with specific instructions as to the nature of the changes to be made. (Ohio General Code Sec. 6602-65, p. 97a) This peculiar nexus between the

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District officials and the trial court gives the District a distinct advantage before that court, and if the District is also granted the exclusive right of appeal therefrom, such favored treatment will not only be a denial of petitioner's constitutional rights, but the District will have achieved a truly despotic control over the property and persons of the property owners in the District.

The second federal question which petitioner seeks to have reviewed is whether a public authority may levy special assessments for the entire cost of a public improvement against only part of the lands which will benefit therefrom. As a result of the decisions of the state courts, the property owners of the cities of Youngstown and Niles, of whom petitioner is one, are about to be assessed for the entire $6,000,000 cost (3a) of additional water facilities which will largely benefit lands valued at more than $70,000,000 (93a) that are not to be subjected to any assessment whatsoever.

The Sanitary District Act of Ohio anticipated the extension of the benefits of sanitary districts to areas not within such districts originally. It specifically requires that all lands benefited in any way by construction of new improvements, whether within or without the district, be appraised on the basis of such benefits so that they may bear their fair proportionate shares of the cost of any new improvement. (Ohio General Code Sec. 6602-60, p. 96a) In spite of this clear statutory mandate, the trial court upheld the appraisers' action in refusing to appraise the benefits accruing to the lands outside the District and appraising the "benefits" accruing to lands within the District on a wholly fictitious basis, with the result that a part of the benefited lands will be assessed for the entire cost of the proposed improvement. The court, in its opinion (19a), like the

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appraisers in their report (2a), acknowledged that the outside area would be benefited, but it was not thereby deterred from approving the violation by its appointees of a clear statutory directive in making such appraisal.

The situation here presented is not unlike those wherein public authorities, for the purpose of taxation, have fully valued certain properties and intentionally and systematically undervalued other properties. It is an established rule of law that such intentional undervaluing of certain properties constitutes a denial of equal protection of the laws to those persons owning properties which have been fully valued. In **Sunday Lake Iron Company v. Wakefield,** 247 US 350, 352, 62 L ed 1154, 1155, 38 S Ct 495 (1918) the court said:

> "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination whether occasioned by express terms of the statute or by its improper execution to duly constituted agents and it must be regarded as settled that intentional systematic undervaluation by state officials of one taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property."

Again, in the case of **Sioux City Bridge Company v. Dakota County,** 260 US 441, 67 L ed 340, 43 S Ct 190 (1923) it was held that a bridge company had been the victim of unlawful discrimination when its property was assessed at its full valuation while other county property was assessed at only a fraction of its value.

If such undervaluation of property constitutes unfair discrimination in violation of the equal-protection-of-the-laws doctrine of the Constitution, an **a fortiorari** violation exists where a sanitary district court permits and, in fact,

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actively assists public officials to levy upon certain properties the entire burden of paying for additional water facilities and to relieve from assessment certain other properties which will clearly be benefited by such facilities.

Further, it is submitted that the assessment of the entire cost of a public improvement against only part of the area benefited and required by statute to be assessed is a violation of the due process clause of the Fourteenth Amendment. Such action is in direct violation of the rule laid down by this court in **Norwood v. Baker**, 172 US 269, 43 L ed 443, 19 S Ct 187 (1898), which held that exaction from the owner of private property of the cost of a public improvement in excess of the special benefits accruing therefrom to such owner, is, to the extent of such excess, a taking under the guise of taxation, of private property for public use without compensation. A case even closer to the factual situation herein presented is **Myles Salt Company v. Board of Commissioners of the Iberia and St. Mary Drainage District**, 239 US 478, 485, 60 L ed 392, 396, 36 S Ct 204, 206 (1916), in which this honorable court held that "a drainage district has the special purpose of the improvement of particular property and when it is so formed to include property which is not and cannot be benefited directly or indirectly, including it only that it may pay for the benefits to other property, there is an abuse of power and an act of confiscation." We submit that the actions and the apparent motives of the drainage district in that case and of the Sanitary District here are essentially the same, and that such actions result in both cases in an unconstitutional confiscation of property.

This court has clearly stated in the above-cited cases that assessments levied upon property to pay for improvements

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that cannot benefit such property, or assessments in excess of the benefits accruing to such property by reason of such improvements, are violations of the Fourteenth Amendment to the Constitution. We submit that by the same reasoning, the action of the District in levying assessments upon certain benefited properties in an amount greatly in excess of the benefits accruing to such property, and equal to the entire cost of the proposed improvement, while relieving other benefited properties from any assessment, is discriminatory and confiscatory with reference to the properties assessed, and is a violation of the Fourteenth Amendment to the Constitution.

This cause marks the first of what may well be a number of improvements to the Mahoning Valley Sanitary District facilities in keeping with the growth of population and industry in northeastern Ohio. (24a, 25a) Unless this honorable court grants relief from this unconstitutional tax burden, the owners of property within the District, being without any control over the officers or activities of the District, will be exposed to assessment for the entire costs of all future improvements despite the absence of any benefit to their properties.

When the appellate courts of Ohio denied petitioner the right to appeal from the decision of the trial court which will result in the assessment of petitioner's property at a rate out of all proportion to the benefits to be received, petitioner was left without means of securing a review of this unconstitutional taking and has been forced to come before this honorable court for protection of its rights. As indicated by the above-cited cases, this honorable court has been vigilant in upholding the constitutional principle that special assessments on private property for the pur-

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pose of meeting the cost of public improvements are enforceable only to the extent that the property on which such assessment is levied is specially benefited. We respectfully submit that the action of the Mahoning Valley Sanitary District in this cause violates that principle by assessing petitioner and all other owners of property within the District for the entire cost of a public improvement which will not and is not intended to materially benefit such properties. We pray that this honorable court hear this cause in order to protect the owners of such properties from this infringement of those rights guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

CONCLUSION.

This case is a portrayal of the obstacles encountered by petitioner, a private property owner, in attempting to force a great public authority to comply with the law governing its existence, and to recognize the rights guaranteed by the Constitution of the United States to private property owners. The obstacles increase where, as in this case, the trial court to which petitioner must apply for protection from the unconstitutional acts of the public authority, appoints and supervises the conduct of the officials in charge of the public authority. The trial court, in approving the taking from petitioner of its property for a public purpose without just compensation and denying to it the equal protection of the laws, has grievously wronged petitioner and other property owners in the cities of Youngstown and Niles. The state appellate courts, in forbidding to petitioner any right to appeal from the decision of the trial court, while granting to the public authority an unrestricted

right of appeal, have denied petitioner and like property owners the vital right to stand before the law on an equal footing with their adversary—the public authority.

For these reasons, petitioner respectfully prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

JAMES E. MITCHELL,
Counsel of Record for Petitioner.

Of Counsel:
FRANK C. DUNBAR, JR.

IN THE COURT OF COMMON PLEAS OF MAHONING COUNTY, OHIO.

IN THE MATTER OF THE MAHONING VALLEY SANITARY DISTRICT.

[No. 58478.]

EXCERPTS FROM REPORT OF BOARD OF APPRAISERS.

[Filed December 7, 1951.]

(Also a part of the record by virtue of its having been introduced as Board of Appraisers' Exhibit 5 in hearing of January 21, 1952.)

Appraisals of Benefit.

Units Receiving Benefits.

The board has examined the official plan and amendment No. 1 to the official plan. It has also noted the elements which the original board of appraisers considered as producing benefits from the official plan. The board recognizes that amendment No. 1 enlarges the facilities for supplying, processing and pumping water, thus increasing the quantity but not improving the quality of the water made available to the member cities.

The board has held a number of hearings on the subject of amendment No. 1 and the resulting benefits. These hearings were attended by officials, councilmen and other interested citizens of the member cities. Also attending were representatives of the Ohio Water Service Company of Struthers, Ohio.

We have been furnished at the hearings and through reports the opinions and computations of many expert engineers. These reports have been helpful, although in many cases contain conflicting opinions.

The board has given due consideration to sales of water by member cities to consumers in areas beyond or outside the municipal limits. It has been suggested to the board that such areas be made a part of the district. With this we do not agree.

However, the board believes that the said areas should pay to the cities for all water so furnished an amount sufficient to justify return on capital investment, and pay costs of operation, maintenance and expansion. The board is of opinion that rates should be adjusted to fully reimburse the cities for all such charges.

The board therefore has appraised benefits to the cities of Youngstown and Niles as political entities, and to no other units. It is our opinion that this method will best serve the public and taxpayers and provides a satisfactory basis for distributing the cost equitably to all benefited units.

Total Benefits.

In determining the total benefits of amendment No. 1 this board has found that it is difficult to fix benefits with mathematical precision. A number of opinions and computations of expert engineers have been furnished the board in reference to methods of determining total benefits.

It is worthy of comment that different calculations of various people arrive at similar conclusions, namely, that benefits exceed the cost of amendment No. 1 in the approximate ratio of two to one.

The board believes that a water supply improvement such as that of amendment No. 1 is essential to the very

existence and well-being of the communities in the district. The improvement is vital to the district's existence and growth. The need being present, the benefits must follow.

In light of the above this board determines that the benefits of amendment No. 1 far exceed the total cost of the improvement. As of August 8, 1951, the consulting engineer, G. Gale Dixon, has re-estimated total cost of improvements in amendment No. 1 at $5,789,000.00.

The board estimates the benefits due to said amendment at approximately twice that amount, or at $12,000,000.

Apportionment of Total Benefits.

A majority of this board (Mr. Swaney and Mr. Belknap) believes and determines that the apportionment of benefits as between the member cities can best and most equitably be apportioned through the comparison of two factors, namely, the tax duplicates of the two cities and the water consumption of the two cities.

Inasmuch as Niles has had a re-appraisal of property since 1949, but Youngstown has not, the board has used the 1949 tax duplicate figures of both cities in its calculations as best representing the relative value of the two cities. In 1949 Youngstown tax duplicate was 91.9% of the total and Niles was 8.1% of total.

In arriving at proper comparison in water consumption by the two cities consideration was given to past and present average consumption and peak load rates. It was determined that the average total water consumption for the past 5 years (1946 to 1950 inclusive) should be used for determining comparison of water consumption, which comparison should prevail for a 5 year period, after which the then immediate past 5 year period would be used for determination of the succeeding 5 year period.

The proportional percentage of total water consumption during the years 1946 to 1950 inclusive by the member cities including each city's surplus water sold to McDonald was for Youngstown 76.2%, and for Niles 23.8%.

The sanitary district law provides that not more than 90% of total levies over a 5 year period against a member city for retirement of bonds may be paid out of water income of that city. The remaining 10% must be paid as an ad valorem tax. It is believed that this provision is recognition that there is always a general benefit from any water supply improvement which is reflected in public health, safety, comfort, convenience, welfare and more especially in fire protection. The 10% therefore represents the minimum amount to be allocated to general benefit which in turn is to be paid as an ad valorem tax.

Ten percent of the total benefit, therefore, is herein allocated to the member cities in proportion to value of tax duplicate.

It is our further determination that the remaining 90% is best and most equitably allocated to the member cities in proportion to water consumption. It is believed that a major portion if not all of the 90% portion of the cities' levies will be paid out of water income of the member cities. This would place the major portion of the expense of amendment No. 1 uniformly on the water consumers in accordance with volume of water used.

The result of the foregoing determination of benefits as between the member cities is as follows:

City	From Tax Duplicate 10% of Total	From Consumption 90% of Total	Total Benefit Percentage
Youngstown	91.9%=9.19%	76.2%=68.58%	77.77
Niles	8.1%= .81%	23.8%=21.42%	22.23
Totals	10.00%	90.00%	100.00

It is herein determined that the above percentages of benefit for amendment No. 1 as against the member cities, namely, 77.77% for Youngstown and 22.23% for Niles, represent the most equitable apportionment of the total benefit possible at the present time. These percentages should prevail for the first 5 year period of levies made against the member cities.

It is our further recommendation that subsequent levies over 5 year periods, using the same formula, should be adjusted to the most recent tax duplicate figures of the two cities of that date and to the average total water consumption for the 5 calendar year period immediately preceding the year of adjustment.

EXCEPTIONS TO REPORT OF THE BOARD OF APPRAISERS.

[Filed January 4, 1952.]

Now comes the Ohio Water Service Company, a property owner and taxpayer of the city of Youngstown, and a public supplier of water in communities adjacent to the Mahoning Valley Sanitary District, and files these its exceptions and objections to the report of the board of appraisers of the Mahoning Valley Sanitary District on the review of the appraisal of the benefits of the construction of the official plan of the Mahoning Valley Sanitary District and to the report of said board of appraisers on amendment No. 1 of the official plan of the Mahoning Valley Sanitary District and says:

1. That certain areas of Mahoning and Trumbull counties outside the Mahoning Valley Sanitary District have become dependent upon the Mahoning Valley Sanitary Dis-

trict for a supply of water for domestic, municipal and public use.

2. That these areas include but are not limited to the following:

Mahoning County.

A. The village of Canfield and its environs.

B. Lands embraced in Boardman sewer district No. 1.

C. Lands embraced in Austintown township sewer district No. 5.

D. Lands embraced in Canfield-Austintown sewer district No. 15.

E. Lands embraced in Cornersburg sewer district No. 14.

F. Lands embraced in West Austintown sewer district No. 13.

G. Lands embraced in Lanterman sewer district No. 7.

Trumbull County.

A. The village of McDonald.

B. Northwesterly section of Weathersfield twp.

C. Southerly section of Weathersfield twp.

D. Eastern section of Weathersfield twp.

E. Lands embraced in Liberty sewer district No. 1.

F. The city of Girard.

3. That the average daily consumption of Mahoning Valley Sanitary District water in these outside areas has increased very substantially in recent years until the present time when these areas are receiving more than 5,000,000 gallons per day, or one-sixth of the Mahoning Valley Sanitary District's total daily output, and said increasing consumption is one of the two principal factors creating the need for the facilities included in amendment No. 1 of the official plan of the Mahoning Valley Sanitary District.

4. That, although the outside areas now benefit from the Mahoning Valley Sanitary District in the same manner

and to the same extent as lands within the district, no appraisal has ever been made of these benefits and consequently no assessments have ever been levied upon these areas for the cost of the present facilities of the Mahoning Valley Sanitary District.

5. That the board of appraisers reporting to this court was specifically directed to appraise all benefits accruing, since the original Mahoning Valley Sanitary District appraisal, to lands and properties both within and without the Mahoning Valley Sanitary District from the district's present facilities, as provided in G. C. Section 6602-72, but said board of appraisers, contrary to this court's directive, failed to appraise or apportion the benefits which are being received and enjoyed now by the above mentioned outside areas from the district's present facilities.

6. That, in connection with amendment No. 1 of the official plan of the Mahoning Valley Sanitary District, the board of appraisers was directed to appraise the benefits to all lands outside the Mahoning Valley Sanitary District affected by the proposed Mahoning Valley Sanitary District's improvements, as provided in G. C. Section 6602-60, but said board of appraisers, contrary to this court's directive, failed to appraise or apportion any benefits from the proposed improvements to the above mentioned outlying areas, which not only have contributed substantially to the need for these proposed improvements, but which are confronted with a probable curtailment of water service unless said improvements are constructed.

7. That the second principal factor creating the need for the proposed improvements set forth in amendment No. 1 is industrial consumption within the boundaries of the Mahoning Valley Sanitary District, which has grown from less than 750,000 gallons per day when the district com-

menced operations to nearly 12,000,000 gallons per day at the present time; that in the year 1951 alone, said industrial consumption within the Mahoning Valley Sanitary District increased nearly four million gallons per day; that the board of appraisers failed to recognize this factor in assessing the benefits which will result from amendment No. 1, and has assessed and apportioned benefits in such a way as to impose the cost of the proposed improvements on the lands and properties of the Ohio Water Service Company and the residential and commercial property owners and water consumers within the Mahoning Valley Sanitary District who have borne the cost of the district's present facilities but who have in no way contributed to the need for the proposed improvements set forth in amendment No. 1 of the official plan.

Wherefore, the Ohio Water Service Company prays that the reports of the board of appraisers be returned to said board of appraisers; that said board be directed to comply with the directives originally issued by this honorable court; and that said board be directed to fairly and equitably assess and apportion the benefits which will result from the proposed improvements in amendment No. 1 of the official plan of the Mahoning Valley Sanitary District upon those who have created the need for said improvements and who will benefit by their construction.

MITCHELL, MITCHELL & REED,
Attorneys for Ohio Water Service Co.

[Duly verified.]

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OPINION AND DECISION OF COMMON PLEAS COURT ON HEARING ON EXCEPTIONS.

Judge Belt:

This cause came on for hearing on the report of the board of appraisers on Amendment No. 1 of the official plan of the sanitary district and the exceptions thereto filed by various interested parties. The board of appraisers report consisted of a majority report concurred in by two of the appraisers and a separate minority report by one appraiser.

At the outset, the board of appraisers found, unanimously, that the estimated cost of constructing the proposed improvement contemplated in Amendment Number 1 to the official plan was less than the benefits appraised. The court is in accord with such finding, and therefore approves and confirms the report of the board of appraisers insofar as that finding is concerned.

The report, among other things, sets out that the benefits as between the two cities of Youngstown and Niles was heretofore determined by a combination of population and tax valuation ratios, as to the original plan and in that manner an approximate ratio of 9 for Youngstown and 1 for Niles was fixed at the time of the organization of the district.

The directors of the district in this case issued a directive to the board of appraisers to review the original appraisal of benefits as between the member cities, taking into consideration the actual cost of various portions of the official plan, changes in population, changes in tax valuation, and any and all other pertinent matters which should be considered.

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In considering this directive, the board took into consideration the report of the prior board of appraisers, made February 8, 1928, the reports of various engineers, the activities of the district, the member cities populations, tax valuations and the funds paid by each city in past years, as well as many other phases.

After taking all of these matters into consideration, it was recommended by the appraisers that the board of directors adopt such procedure as shall, in effect, relieve the city of Youngstown from the payment of $120,638.97 now standing delinquent from the 1932 levy against the city and that otherwise the remaining levies stand as originally determined.

The majority report of the board of appraisers made the following allocations of cost for the new improvement contemplated by the amendment as between the cities of Youngstown and Niles, to wit:

City	From Tax Duplicate 10% of Total	From Consumption 90% of Total	Total Benefit Percentage
Youngstown	91.9%=9.19%	76.2%=68.58%	77.77
Niles	8.1%= .81%	23.8%=21.42%	22.23

Youngstown, from the tax duplicate 91.9% equalling 9.19%; from consumption, 90% of the total, 76.2% equalling 68.58%, making a total benefit percentage against Youngstown of 77.77%.

Niles, from the tax duplicate, 10.% of total, 8.1% equaling .81%; from consumption, 90.% of total, 23.8% equalling 21.42%, making a total benefit percentage of 22.23%.

The city of Youngstown excepted to this report specifically as follows:

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1. Requests and suggests benefits be apportioned 100% on water consumption.

2. That the apportionment be made each calendar year on the average consumption for the preceding three-year period.

3. Excepts to the failure of the board of appraisers to allow a readjustment of the apportionment of benefits and assessments for the years 1951, 1952 and 1953 on the basis of water consumption.

4. Excepts to the failure of the board of appraisers to allow adjustment of benefits for the three years preceding 1951 on the basis of consumption.

Praying that the board of appraisers recommend to the court that an adjustment be made of the delinquency of $120,638.97 from the 1932 levy.

The city of Niles in its exceptions urge that the factor of water consumption has no place in the determination of benefits and assessments:

1. That the general benefits, reflected in public comfort, convenience, welfare and fire protection can be determined only in accordance with the ratio of the tax valuation of the member cities, further pointing out that the real estate taxpayer of Niles receives but 10% of the benefit but must pay 22.23% of the charges and that the tax valuations be retained as the only factor in allocating cost.

2. That by giving but a 10% weight to the tax valuations of the properties is contrary to the Constitution of the state of Ohio, Article 12, Section 2, which provides that "land and improvements thereon shall be taxed by uniform rule according to value."

3. That the surplus fund be credited to the member cities in the exact proportion in which it was paid to the district.

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4. That the city of McDonald and all other property outside the city limits of Youngstown and Niles be assessed.

Observation is further made of the following language:

> "We appreciate the difficulty of extending the district and the added cost of administration concurrent with the same."

The court appreciates particularly this paragraph contained in the exceptions.

The Ohio Water Service Company charge that the village of Canfield, lands in Boardman sewer district No. 1, lands in Austintown township sewer district No. 5, lands in Canfield-Austintown sewer district No. 15, Cornersburg sewer district No. 14, West Austintown sewer district No. 13, Lanterman sewer district No. 7 in Mahoning county; the village of McDonald, northwesterly section, southerly section and eastern section of Weathersfield township, lands in Liberty sewer district No. 1 and also the city of Girard be included in the district to be assessed.

Other exceptions are filed by various individual property owners in the district.

Section 2 of Article 12 of the Constitution provides that "land and improvements shall be taxed by a uniform rule according to value," and counsel suggests that the action of the board of appraisers was violative of this section.

The court has examined and considered that proposition, and the unanimous conclusion of the court is that it lacks substance. Illustrative of the claim would be the following situation, if the appraised values were used: Assume that certain property in Youngstown has an appraised value of $20,000.00 and like property, in all respects, in Niles has an appraised value of $10,000.00, both using equal quantities

of water. Using the rule of uniformity as claimed, the property owner in Youngstown would pay twice as much or more than the property owner in Niles for exactly the same service. The assessed value for taxation purposes would violate rather than conform to the claimed rule of uniformity. Under this rule, if applicable at all to the situation presented in this case, equal charges for water consumption would more nearly conform to the rule, which proposition is vigorously opposed by the city of Niles. We again say there is nothing of substance in this exception. Water is a commodity, as gas and electricity are commodities, paid for on the basis of quantity used.

From the report of the appraisers and the exceptions thereto, the court conceives the following to be the issues for the court's determination.

1. How should the delinquent account owing by the city of Youngstown be treated.

2. Should there be a change of the proportional levy to pay the original bond issue.

3. Should there be an adjustment of the remaining tax levies between the cities.

4. What should be done with the surplus funds.

5. Should any or all of the territory outside of the boundaries of the original district be assessed, and

6. The division of cost of the proposed bond issue.

Those subjects will be discussed in the order in which they have been stated.

Chapter 4 D of the General Code, comprising Sections 6602-34 to and including Section 6602-106, known as the Sanitary District Code, provides for the organization and operation of sanitary districts and is designed to furnish a comprehensive plan for such organization and operation.

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The sanitary district may be organized for any one of five purposes as set out in sub-section 35 of the chapter. This district was organized and is now being operated under paragraph (e) of said sub-section, that is, for the purpose of providing a water supply for domestic, municipal and public use.

Sub-section 36 provides for the organization of a district by a petition signed either by

1. 500 free-holders.
2. A majority of free-holders.
3. By the owners of more than one-half of the property in acreage; or,
4. By the owners of more than one-half the valuation of property within the district.

This district was properly and legally organized under the chapter referred to.

The first question that presents itself is how the delinquency owing by the city of Youngstown, in the sum of $120,638.97, be adjudicated. The board of appraisers seems to have had serious doubts as to this issue. At the outset, we must assume that the levy for the payment of the bonds was a regular and legal assessment. This assessment was approved by the court on or about the year 1928. This court, in the opinion of all of its members, has no jurisdiction whatever to cancel this delinquency. For authority reference is made to the case of State, ex rel. Donsante, a Taxpayer, v. Pethtel, Auditor, et al., reported in 158 O. S., 35, Ohio Bar of June 16, 1952. The court in that case was dealing with an assessment and in that connection says:

> "Where taxes are legally assessed, the taxing authority is without power to compromise, release or abate them except as specifically authorized by statute."

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For those reasons and upon the authority cited, the court holds that the delinquency cannot be forgiven by the court. Indeed to do so, under the circumstances here presented, would be unfair to the city of Niles, because the amount involved would be credited, if paid, to the surplus funds of the district, which, in turn, would be used to reduce the bonded indebtedness presently in contemplation. We, however, make this suggestion, that, if the city of Youngstown pay to the city of Niles 9.45% of this delinquency, or pay the same to the sanitary district to be credited to the city of Niles on the proposed bond issue, then and in such event we feel that the district itself may, and can legally, if the directors so determine, assign the remainder of said delinquency to the city of Youngstown. As the court understands this situation, it is extremely unlikely that the whole of the delinquency can eventually be paid, for the reason that the amount represents assessments on distress property which has been either foreclosed or forfeited to the state, in which event perhaps only such sums as may be recovered could be applied to the delinquency. If the city of Youngstown so elects to pay to the city of Niles, or to the sanitary district, for the benefit of said city the 9.45% of the delinquency, and shall pay the same on or before 90 days from the time of filing of the entry herein, then and in such case the court finds that the balance of said delinquency may be assigned by the board of directors to the city of Youngstown, and any future recoveries thereon would belong to the city of Youngstown.

Issues 2 and 3 may be considered together and as to such issues the court is of the opinion that it has no jurisdiction either to change the proportionate levy or to adjust the same insofar as the original bond issue is concerned. The

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same reasoning that applies to the No. 1 issue would also apply in full force to issues 2 and 3. All such matters are res judicata.

The fourth issue is how should the surplus funds, which will be credited on the indebtedness incurred by reason of Amendment No. 1, be allocated as between the cities of Youngstown and Niles. The surplus funds of the district may be used as the board of directors may determine for any lawful purpose of the district. It is perfectly proper to apply said surplus or so much thereof as the board of directors may determine, in the exercise of their discretion, to the new project. This surplus fund is a legally created fund belonging to the district and may, in the opinion of the court, be applied to the indebtedness created by reason of the carrying out of the improvements set out in Amendment No. 1. This is a surplus fund and does not belong, in whole or in part, either to the city of Youngstown or to the city of Niles, and such fund may be used by the district for any lawful purpose or objective. 2: If the board of directors elect to apply the surplus of the district, or any part thereof, on the cost of the improvement, the bond issue would be thereby reduced by such sum or sums paid.

Number 5 issue is whether or not any territory outside of the district as now existing should be assessed for the contemplated improvement. As to that proposition, it must be kept in mind that sub-section 36 specifically provides for the organization of the district. In connection with sub-section 36, we have sub-section 60 which provides, in substance, for the appraisement of benefits and damages to lands outside the district and further provides that if the appraisers find that the lands or other property outside of the district will be affected by the improvement or

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should be included in the district that they shall appraise the benefits and damages to such land and file notice in court of the appraisal. Sub-section 61 provides further that if the report of appraisers includes recommendation that other lands be included in the district, it shall be the duty of the clerk of the court before which the proceeding is pending to give notice to the owners of such property by publication to be made as provided in the Act for a hearing on the petition for the creation of a district. There is no further legislation or provision in the Sanitary Code on that subject. Further proceedings are not detailed by the Act, insofar as taking in additional territory is concerned, and are left solely to the imagination. The import of the language referred to is that no additional territory can be taken into the district without a compliance with Section 6602-60. The board of appraisers did not include or appraise any outside territory, which failure upon the part of the board of appraisers, raises an inference at least that no outside lands were benefited. The conclusion of the court is that it is useless to do a vain thing. The court believes that under the situation presented, it would be folly to attempt to take in outside territory. Sub-section 36 would be controlling. That is to say that a district can only be enlarged in the same manner that a district can be created under the law. This may or may not be desirable, but whether desirable or otherwise, the court, as a court, could not initiate such a project. The court further feels that the outside territory served should be taken into consideration in dealing with Issue No. 6, the last and most important issue in this case. It is claimed by at least one of the objectors that an appraisement of the outside territory should be made and then take the territory into the district, but there is a notable failure upon the part of the

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exceptor to furnish any legal plan by which such result can be accomplished. On every hand, as to this issue, practical difficulties would be encountered. This exception is rejected by the court. This court believes that it could not be done. No territory certainly can be taken into the district without the territory under consideration having something to say about it, so this exception is rejected by the court.

The sixth and last issue for the determination of the court is the division of the cost of this project between the cities of Youngstown and Niles. Sub-section 64 provides that all exceptions shall be heard by the court and that the court may, if it deem necessary, return the report to the board of appraisers for their future consideration and amendment and enter its order to that effect, but that the court may, without losing jurisdiction over the roll, order the appraisers to recast the roll when the order of the court specifies the precise character of the changes thereof. In the consideration of the report of the appraisers, the court feels that perhaps the majority of the board of appraisers felt that the city of Youngstown, under the original allocation of cost, had assumed more than its share of the burden and that therefore the city of Niles should be compelled to pay something more than its share of the cost of the improvement under Amendment No. 1. This, of course, is mere speculation upon the part of the court but the court does feel that the proposed allocation of cost between the two cities is somewhat arbitrary and that the appraisers should be ordered to recast the roll under a specific formula as directed by the court. In reaching this conclusion, the court has considered the quantity of water sold by the city of Niles to corporations and individuals outside of its corporate boundaries. The court desires to commend the city

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of Niles for its activities in that respect. In so doing the city of Niles has been made to prosper by reason of having assets outside its corporate boundaries from which it has greatly profited. The same can be said of the city of Youngstown, in an equal degree.

Without going into the many ramifications indulged in by the court in seeking a solution to this problem, which is altogether a question of fact, no question of law being involved, this court has reached the conclusion that the burden placed upon the city of Niles should be modified in some respects, to the end that the outside territory benefited should indirectly at least be caused to pay some of the cost of the improvement occasioned by Amendment No. 1. The court has carefully considered the questions of relative tax values, population and water consumption, together with the respective sales of water outside the district by each municipality and has arrived at the conclusion that 36% of the bond issue should be allocated and charged against the real estate tax valuation, as shown by the latest appraisal of the cities; and by the term "latest appraisal" we mean the appraisals made the same year in the two cities; and 64 percent of the cost should be borne by the municipalities on the water consumption basis, or rather the purchase of water by each municipality. This gives rise to the following formula:

On 36 — 64 Basis

City	From Tax Duplicates 36% of Total	From Consumption 64% of Total	Total Benefit Percentage
Youngstown	91.9%=33.084%	76.2%=48.768%	81.852
Niles	8.1%= 2.916%	23.8%=15.232%	18.148
	36.000%	64.000%	100.000

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Now as to the tax valuations, I think perhaps I covered that. I understand the valuations were considered by the appraisers on the basis of the valuation for the year 1949. Of course, the same formula as given here should be followed, and the valuations should be taken, as of the same year, the latest of which should be used as the available formula.

In arriving at this conclusion the court has examined and considered almost every available formula that could be devised. Inasmuch as tax values and populations are keeping pace one with the other, we have not seen fit to allocate any part of this cost on the basis of population, because if that were done there could be no change in the allocation except by the use of an official census. It therefore abandoned the population test and used the formula heretofore given, that is to say, tax valuation and water consumption.

It is the further order that a recast of the assessment be made every year under the same formula taking into consideration the amount of water consumed during the preceding two years, and tax valuation based on each reappraisal of the same years as approved by the state tax commission. In that way, and in that way only, can we guard against inequalities that might arise by the use or the failure to use water as the same may be brought about by changed conditions or otherwise.

In conclusion, we wish to observe that we believe that under ordinary circumstances the consumption of water should be taken as the basis for the allocation of cost in so far as the law permits, but we further believe that the peculiar situation that confronts this sanitary district will show that the allocation as made by the court guards against inequality and will prove satisfactory to all parties concerned. The report of the board of appraisers is approved

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and confirmed, except as heretofore stated; and the board of appraisers are hereby ordered to recast the roll in accordance with and in conformity to the precise changes as herein specified, and report to this court as to such changes.

An entry may be drawn by counsel for the appraisers, that is Judge Barnum, and submitted to all other counsel for approval, and to the court, which entry will embody and dispose of all of the issues in this case which have been enumerated by the court; and as to any issues not mentioned by the court, the entry will dispose of such matters in conformity to the report of the board of appraisers.

I may have omitted something; if I have, I will ask each of the other judges, or give each of the judges an opportunity to say what they think about.

Birrell, J., and Maiden, J., concur.

Judge Maiden:

I concur in Judge Belt's opinion in toto, both as to conclusions, and as to reasoning.

Now, perhaps something should be said about the language in 6602-64, wherein the word "roll" is used, and recast the "roll". The first sentence of 6602-62 says that "The board of appraisers shall prepare a report of its findings, which—"—I am omitting some words not material here—"—shall be known as the sanitary district appraisal record."

Now, we go to the third sentence from the end of subsection 64, and it reads like this: "The court may, if it deem necessary, return the report to the board of appraisers for their further consideration and amendment, and enter its order to that effect." That word "report", by reference to sub-section 62 means the sanitary district's appraisal record, because the statute so says.

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Now, reading the next to the last sentence of sub-section 64, "If, however, the appraisal roll as a whole is referred back to the appraisers, the court shall not resume the hearing thereof without new notice, as for an original hearing thereon." Now, the sentence uses the words "appraisal roll." That can mean nothing further than the "report" above mentioned, and the appraisal record mentioned in the sub-section 62.

Reading the last sentence of sub-section 64, "But the court may, without losing jurisdiction over the roll—"—interpolating, that means the appraisal roll as mentioned in the preceding sentence. Reading further: "—order the appraisers to recast the roll",—that is, the appraisal roll, or, following the thought back further, the appraisal record. Reading on further: "—when the order of the court specifies the precise character of the changes thereof", and in that instance the court does not lose jurisdiction over the appraisal record or the report of the board of appraisers.

Now, by reference to Webster's Dictionary, I wanted to know what the word "roll" means. The definition is this: "That which is rolled up. Specif: A document on material such as parchment which may be rolled up; a scroll. Hence, an official or public document, as the engrossed record of the proceedings of a public body, as of a court, or of Parliament: a record."

Now, by reference to the Conservancy Act, 6828, subsections 30 and 32, we find substantially the same procedure outlined there as in the Sanitary Act; and in the Conservancy Act the wording speaks of the "appraisal record", and the appraisers may be ordered to "recast the appraisal record" when the order of the court specifies the precise character of the changes thereof.

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A reference to those similar sections in the Conservancy Act leads to the conclusion that when the sub-section 64 says "that the court may, without losing jurisdiction over the roll, order the appraisers to recast the roll", it means appraisers to be ordered to recalculate and compute over again the appraisal record which is mentioned above and in the preceding Section 62.

The Oxford English Dictionary defining "recast" is as follows: "To compute over again, to recalculate." So I thought that this explanation should be made of the meaning of those words, because evidently the Act, or someone working with the Act, before it became law, used the old common law phrase "recast the roll", and that has the meaning which has been given to it in the court's opinion here.

Judge Belt:

That is the usual practice in all conservancy courts; I happen to know that. If a court desires to set out specific changes, the appraisers simply make those changes and return the roll, and that is the order in this case.

Judge Birrell, have you anything to say?

Judge Birrell:

I concur in the decision as announced by Judge Belt. I have no matters to mention except two, and those two I feel as if should be mentioned because this district is going to continue for many years, and possibly the court of jurisdiction will continue for some little time, and sometime in the future they will look back to the decision that has been made by this court at this time as precedent for future decisions in similar matters.

The two things that I wish to mention are these: In the first place, while I concur in the opinion of Judge Belt

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with reference to the taking into the district of outside territory, it seems to me that, under the statutes, there is the possibility of appraising benefits upon property which have been benefited by the improvement even though that property is already outside the district, and even though that property may not be taken into the district. It is unnecessary for me to discuss the law on that matter.

I concur in the report of the board of appraisers for the reason that under all of the matters which were considered by the board of appraisers, and which were considered and discussed by the original board of appraisers in 1928, I can see that there is a great possibility that it is wiser, perhaps, to carry on this district by considering solely the cities of Youngstown and Niles as parts of the district. And under that view, I would not say—I wouldn't set myself up as saying—that the board of appraisers are in absolute error in determining the method of appraising the benefits. However, I think that this district is not owned by either the city of Youngstown, or the city of Niles; the district is an area which is greater than those two cities, and of which those two cities merely are a part.

As the use of water grows in general—I am going to use this term "metropolitan area", which this district serves—the question is going to arise in the future, as it has already arisen at the present time, of whether the outside areas should be used by the cities as a method of selling surplus water, and thus making money for the cities. It seems to me that it would be better, rather than meeting the problem as the appraisers have met it at this time, and as future directors and boards of appraisers and courts of jurisdiction will be required to meet it when it becomes necessary again to enlarge the district by Amendment Number 2 and 3, and so forth, and thus run up against this question

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how are they going to divide the cost of the improvement between the two member cities, it would be better at this time to assess the added benefits, not only against the two cities, but against the territory outside of the member cities in some certain proportion as that territory accepts the benefit of the water which is produced by this district.

The second thing that I wish to speak about is the division of benefits between the member cities, or rather the division of the costs between the member cities. I concur in the decision for this reason: According to the statutes, the board of appraisers merely divided the benefits between the two cities, and the board of appraisers have the right to consider the elements which they used in determining division of this benefit. They are now using the element of consumption as one of the elements which should be considered. The element of consumption was considered by the original board of appraisers. The original board of appraisers, in 1928, following the recommendation of the engineer of the district, as is shown by a copy of his recommendation in one of the exhibits, found that there were three elements at that time which should be considered in determining the method of division. Those three elements were population, tax valuation and consumption. At that time, the board of appraisers came to the conclusion that the consumption of water was paid for by the cities in accordance with the amount that they used, and that was allocated entirely to the maintenance fund; therefore, they left that out of their consideration when it came to dividing the benefits between the cities for the payment of the fund for construction of the district, and, therefore, they only considered population and tax valuation.

Now, very possibly the present board of appraisers have determined to consider only tax valuation and consump-

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tion, and it is very possible for them to consider consumption as more important than tax valuation. As long, however, as the statutes do not permit the expense of enlarging the territory and the cost of enlarging the plant, when that cost is over ten per cent, to be assessed by water consumption, it seems to me that it would be very proper for this district, or this area which is affected by that matter, to secure an amendment to the statutes governing the affairs of water districts to secure an amendment of those statutes to permit the district itself to issue its bonds and pay for them out of its charges for the sale of water, rather than by assessment upon the lands or member cities of the district.

Mr. Hunt: If Your Honors please, I understand the court to state that this formula was to be applied yearly, that is, it was to be recomputed yearly. I didn't understand you to indicate whether that was to be on the previous consumption, for instance, previous—

Judge Belt: Previous two years.

I think you will get a copy of this opinion. I think every counsel should have a copy of the opinion of the court.

Judge Barnum: If the court please, I have listened with a great deal of care and attention to your opinion, and the remarks of your concurring members.

You have put the burden upon me to draft a journal entry, and I would like to make an inquiry as to that journal entry. As I look at your opinion, and your idea, you do not wish to enter any final judgment on any phase of it as of this time; all that you want the journal entry to include is a directive to the board of appraisers to recast, make the amendment that you suggested, and report back, and that you will reserve your final judgment, order and decree, upon all of these questions when you hear the amendment, or the recast of the roll.

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Judge Belt: That is true. My notion is that if the directive is followed by the board of appraisers, and sent back to the court, of course, that court will approve it; otherwise, it might order some further change, but I am sure when you examine the opinion you will follow the directive of the court. There is really only one. The court approves the report of the board of appraisers in every respect, except as to the allocation as between Youngstown and Niles.

Judge Maiden: Judge Barnum, I don't know whether Judge Belt got what your inqury was. Judge Barnum wanted to know whether you wanted a complete journal entry journalized, based upon this opinion now, or whether the journal entry to go on would merely be referring back to the board for action in accordance with the opinion, and the complete journal entry go on after the board returned the report to the court. That, as I understand it, is his inquiry.

Judge Belt: I think a journal entry should go on now, directing the board to make the changes in the respects indicated. Of course, that is not the final journal entry. If the final journal entry will be approved by the court after the changes have been made, and the whole matter submitted to the court, if correctly made, the court will approve, otherwise not.

Judge Barnum: While I am on my feet, and I think I am speaking on behalf of all counsel and all parties interested in this case, I want to thank all three members of the court, and I want to especially thank Judge Belt for his care, his attention and time that he has put in on this matter, and especially his patience. You will be remembered by all of us as one having a marked degree of patience, as well as a marked degree of ability. I want to thank you very kindly.

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Judge Belt: Really, Judge Barnum, I have enjoyed it. Thank you.

Mr. Hunt: For the purpose of the record, Your Honors, may we have our exceptions noted?

Judge Belt: Exceptions may be, of course, filed by all parties upon the presentation of the entry, and its approval.

MOTION FOR NEW TRIAL.

[Filed October 8, 1952.]

Now comes the Ohio Water Service Company, and respectfully moves this court to set aside and vacate the final order, judgment and decree rendered in this action on the twenty-ninth day of September, 1952, and grant to it a new trial, for the following reasons:

1. That the order, judgment and decree of the court of jurisdiction, authorizing the city of Youngstown to pay to the city of Niles 9.45% of the delinquent 1932 levy against the city of Youngstown, is contrary to law.

2. That the order, judgment and decree of the court of jurisdiction directing certain property owners who did not file exceptions and objections to the report of the appraisers to execute to the Mahoning Valley Sanitary District, easements for the construction of the pipeline set forth in amendment No. 1 of the official plan, is contrary to law.

3. That the order, judgment and decree of the court of jurisdiction directing that those property owners who objected to the award of damages set forth in the appraisers' report may demand a jury trial within ten days from the filing of this entry, is contrary to law.

4. That the order, judgment and decree of the court of jurisdiction approving that portion of the report of the

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board of appraisers finding that areas outside the Mahoning Valley Sanitary District receiving sanitary district water should neither be included in the district nor assessed for benefits received from amendment No. 1, is not sustained by sufficient evidence, and is contrary to law.

5. That the order, judgment and decree of the court of jurisdiction, setting up a formula for annually dividing the costs of amendment No. 1 between the cities of Youngstown and Niles on the basis of water consumption and tax valuation, is contrary to law.

6. That the order, judgment and decree of the court of jurisdiction establishing a formula for determining annually the benefits and assessments for amendment No. 1 against the property of this objector and exceptor, is not sustained by the evidence, and furthermore, is contrary to law.

7. That the order, judgment and decree of the court of jurisdiction relating to the expenditure of surplus funds by the directors of the Mahoning Valley Sanitary District is contrary to law.

8. That the order, judgment and decree of the court of jurisdiction, finding that the benefits of at least $12,000,000 accruing from the construction of amendment No. 1 to the cities of Youngstown and Niles, which comprise in its entirety the Mahoning Valley Sanitary District, is not sustained by sufficient evidence.

9. That the order, judgment and decree of the court of jurisdiction, finding that the benefits from amendment No. 1 to the property located within the boundaries of the district, including the properties of this objector and exceptor, are in excess of the costs of amendment No. 1, is not sustained by the evidence.

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10. That the order, judgment and decree of the court of jurisdiction is contrary to law in that it violates the Constitution of the state of Ohio and the Constitution of the United States of America.

Respectfully submitted.
MITCHELL, MITCHELL & REED,
Counsel for Ohio Water Service Co.

Brief.

(Attached to motion for new trial pursuant to rules of practice of Mahoning County Common Pleas Court.)

Several years ago the Ohio Water Service Company petitioned the court of jurisdiction for a declaratory judgment as to certain rights and powers of the Mahoning Valley Sanitary District and its directors. The court of jurisdiction reviewed the provisions of the Sanitary District Act and, finding no specific authority therein for entertaining such an action, dismissed the petition. This honorable court held that it was only a court of limited and special jurisdiction and could act only when specifically authorized to do so by the Sanitary District Act. This decision was upheld by the Court of Appeals, and the Supreme Court refused to grant a motion to certify the record.

In the order, judgment and decree filed in this hearing on the exceptions to the report of the appraisers, this honorable court of jurisdiction has made certain findings for which there is no authority in the Sanitary District Act. There is no authority in the act (nor in the general statutes of Ohio), for the Sanitary District Court to relieve a property owner or a municipality in a sanitary district of a delinquent assessment upon the payment of a share of that assessment to the other property owners or municipalities

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the district. There is no authority in the Sanitary District Act for the court of jurisdiction to take over completely the functions of the board of appraisers, nor is there any authority in the act for the court of jurisdiction to devise a formula for allocating costs of a new improvement between municipalities in a sanitary district. And, finally, there is no authority in the Sanitary District Act for the court of jurisdiction to declare how, or by whom surplus funds of the district may be spent. Therefore, it is submitted that the order, judgment and decree of this court relating to such matters is contrary to law.

The decree of this court establishing a formula for allocating the costs of the new improvement between Youngstown and Niles is contrary to law for an additional reason. The Sanitary District Act (G. C. 6602-62) required a detailed report of the benefits assessed to each property in the district. The Supreme Court of Ohio in the case of Chamberlain v. Cleveland, 34 O. S., 51, announced a rule of law which also requires a detailed appraisal of each property that is to be subject to the payment of the cost of a new improvement. The fact that the board of appraisers would be required to prepare a very lengthy appraisal roll, setting forth thousands of properties for which benefits are specially assessed, does not relieve the appraisers from following the statute. Ryan v, Conservancy District, 104 O. S., 79. And, finally, this formula which is based on water consumption and tax valuation and which will vary the annual assessment upon the cities from year to year as the benefits to the cities vary, is contrary to the principle of law announced in the case of Gross v. Conservancy District, 141 O. S., 52. The Supreme Court held that benefits assessed at the time a new improvement is to be constructed cannot later be varied or changed by

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reason of increases or decreases in tax valuation or other changed conditions.

Passing to the subject of the court's decree with respect to the assessment of outlying areas, the Sanitary District Act is specific on the matter of appraisers assessing benefits to areas outside the district which will benefit from a new improvement. G. C. Sections 6602-58, 59 and 60 make this a mandatory duty upon the board of appraisers if it is found that outlying areas will benefit from the proposed improvement. The testimony in this case is quite clear to the effect that outlying areas not only will benefit from the improvement but that the improvement is being constructed for their benefit. The uncontradicted testimony of all expert witnesses was that water consumption in these areas is giving rise to the immediate necessity for the improvement. The decree of the court approving the report of the appraisers not to include these areas in the district nor to assess any benefits to them is not sustained by the evidence and is contrary to law.

This court has also decreed that proceedings be commenced for the acquisition of easements for the pipeline to connect Berlin and Meander dams. Such an order is contrary to law unless the evidence clearly shows that the benefits to the areas assessed for the new improvement exceed the cost of the improvement which these areas must bear. (G. C. 6602-65.) There is no evidence in this case whatsoever as to what the value of the actual benefits of the new improvement is to the areas within the cities of Youngstown and Niles. In fact, the only evidence in the case as to the value of the benefits is an assumption by the board of appraisers that any "well constructed" and "well located" improvement is worth twice the cost. The appraisers made no analysis or determination of the benefits

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which will accrue from amendment No. 1, and all the engineering experts who appeared in the case testified that were it not for the consumption in the outlying areas, which are not to be assessed, there would be no immediate need for proceeding with amendment No. 1. Consequently, there has been no showing in this case that the benefits to the areas to be assessed will exceed the cost of the improvement.

In conclusion, the order of the court violates the provisions of the Constitution of the state of Ohio, and the Constitution of the United States of America. Among other provisions Article I, Section 2 of the Constitution of the state of Ohio, providing that the government is instituted for the equal protection and benefit of the people, is transgressed by an order assessing the cost of a new improvement upon only a part of the area which will benefit thereby. Article XII, Section 2 of the Ohio Constitution provides that lands and improvements shall be taxed by uniform rule according to value, and this section is violated by a formula assessing 64% of the cost of the new improvement on the basis of water consumption. If the Sanitary District Act were deemed to be broad enough to cover the decree of this court, then such an act would be in derogation of the Fourteenth Amendment of the Constitution of the United States of America, which prohibits a state from denying the equal protection of the law to any persons within its jurisdiction. Equal protection of course is denied where one group of taxpayers is forced to build a new improvement for the benefit and convenience of another group of taxpayers who are not compelled to contribute to the cost of the improvement.

Respectfully submitted,

MITCHELL, MITCHELL & REED,

Counsel for Ohio Water Service Company.

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NOTICE OF APPEAL FROM ORDER OF SEPTEMBER 29, 1952.

[Filed March 28, 1953.]

Appellant hereby gives notice of its appeal on questions of law to the Court of Appeals for Mahoning county, Ohio, from the final order and decree made and entered on the twenty-ninth day of September, 1952, motion for new trial having been overruled on the nineteenth day of March, 1953.

MITCHELL, MITCHELL & REED,
Counsel for Appellant.

NOTICE OF APPEAL FROM ORDER OF MARCH 19, 1953.

[Filed March 28, 1953.]

Appellant hereby gives notice of its appeal on questions of law to the Court of Appeals for Mahoning county, Ohio, from the final order and decree made and entered on the nineteenth day of March, 1953.

MITCHELL, MITCHELL & REED,
Counsel for Appellant.

TRANSCRIPT OF DOCKET ENTRIES, COMMON PLEAS COURT.

1952, January 4. Exceptions to reports of the board of appraisers filed.

1952, September 29. Hearing: Decree of court on appraisers' reports. Reports approved and confirmed; exceptions allowed to all objectors and exceptors.

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1952, October 8. Motion for new trial filed. (Ohio Water Service Co.)

1952, December 10. Hearing: Motion for new trial filed by Rose E. Spagnola et al. withdrawn and dismissed. Motion filed by the Mahoning Valley Sanitary District to strike motions for new trial overruled and exceptions noted. Motion to strike notice of appeal overruled and exceptions noted. Journal entry of September 29, 1952, set aside and matter of apportionment of total benefits taken under advisement and further consideration. Report returned to board of appraisers for recast and amendment.

1952, December 15. Second amendment or re-cast of sanitary district appraisal record on amendment No. 1 of the official plan by the board of appraisers filed.

1952, December 20. Motion to set aside journal entry filed.

1953, February 16. Exceptions to the amendment or re-cast of sanitary district appraisal record filed.

1953, March 19. Hearing: Report approved. Property owners who have filed objections may within ten days file with the clerk of courts a written notice making demand for jury trial and shall file a bond in the sum of $200.00. Court approved second amendment or re-cast of sanitary district appraisal record on amendment No. 1 of official plan bearing date of December 10, 1952. Mahoning Valley Sanitary District authorized to issue bonds. All exceptions overruled. Clerk to transmit copy of decree to secretary of board of directors.

1953, March 28. Notice of appeal of Ohio Water Service Company filed.

1953, March 28. Precipe filed.

1953, March 28. Notice of appeal of Ohio Water Service Company filed.

1953, March 28. Precipe filed.

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1953, April 17. Transcript of re-hearing of board, Monday, December 22, 1952, also hearing of February 16, 1953, Ohio Water Service partial bill of exceptions filed also all exhibits.

1953, April 25. Letter from Mitchell, Mitchell & Reed as to partial bill of exceptions filed.

TRANSCRIPT OF JOURNAL ENTRIES, COMMON PLEAS COURT.

First Order Approving and Confirming Board of Appraisers' Report.

September 29, 1952. 1. This day the above cause came on to be heard upon two reports of the board of appraisers of the Mahoning Valley Sanitary District: The first report being entitled "Review of appraisal of benefits as between the member cities on account of construction of official plan of district",—and the second report being entitled "Report on amendment No. 1 of the official plan". Said hearing was also had upon an amendment or re-cast of the sanitary district appraisal record on amendment No. 1 of the official plan.

2. The court finds that all proper parties have been served as required by law; that due and proper advertisement of said hearing has been made as required by Section 6602-63 of the General Code of Ohio; that the cities of Niles and Youngstown have filed exceptions and objections to said reports; and that the Ohio Water Service Company and Rose E. Spagnola, et al. have both filed objections and exceptions to said reports.

3. The court finds that it has full and complete jurisdiction to hear and determine all matters involved herein and has jurisdiction over all parties interested herein.

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4. The court finds that said reports of said appraisers and the amendment or re-cast as made by said board of appraisers have been signed and approved by at least a majority of the members of said board of appraisers and deposited with the clerk of this court and by him filed in this cause; that the board of appraisers by its secretary gave due notice of said reports of the board of appraisers by registered mail or personal service to owners of the various properties affected by the appraisal of compensation and damages, and to the mayor and the city council of each of said cities to which benefits had been appraised, to wit: the city of Youngstown, Mahoning county, Ohio, and the city of Niles, Trumbull county, Ohio.

5. The court finds that during the hearing herein the court ordered the board of appraisers to re-cast and amend that portion of the report of the appraisers on amendment No. 1 of the official plan entitled "Apportionment of total benefits" as between the member cities, to wit: the city of Youngstown and the city of Niles,—which amendment and re-cast has been made and approved by all of the members of said board of appraisers and has been filed herein, as required by a journal entry of this court heretofore filed herein August 28, 1952.

6. The court comes now to consider that report of the board of appraisers entitled "Report on review of appraisal benefits as between the member cities on account of construction of official plan of district", which report was concurred in by all members of the board of appraisers.

7. The court finds that the original method of allocation of costs between the member cities of the district for jointly used facilities was apportioned by a formula taking into consideration tax valuation and population,—giving equal weight to each; that during the last twenty years the ratio

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of valuation and population has changed but little. Some years results obtained by the use of this formula have favored one member and then the other. The amount by which either has been favored, however, is minor when considered in the light of the entire project; and each member city of the district has attained many fixed benefits because of the availability of an unrestricted supply of pure, soft and potable water to be used for any purpose which they may desire.

8. The court finds that in said report the board of appraisers recommends that the board of directors of the Mahoning Valley Sanitary District adopt such procedure as shall in effect relieve the city of Youngstown from the payment of $120,638.97 now standing delinquent from the 1932 levy against the city of Youngstown; and that otherwise the remaining levies against the member cities stand as originally determined. This court in the opinion of all of its members finds that it has no jurisdiction whatever to cancel this delinquency. The court, however, orders, adjudges and decrees that if the city of Youngstown shall within ninety (90) days from the time of filing of the within entry pay to the city of Niles 9.45% of this delinquency, or pay the same to the sanitary district to be credited to the city of Niles on the proposed bond issue of carrying out amendment No. 1 of the official plan,—then and in such event the directors of said the Mahoning Valley Sanitary District shall assign and set over the remainder of said delinquency to the city of Youngstown; and that any future recoveries upon said delinquency shall become the property of said city of Youngstown; and that the recommendation of the board of appraisers as contained in said "Report on review of appraisal of benefits as between the member cities on account of construction of official plan of district" be and is hereby denied.

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9. Coming now to consider the report of the board of appraisers entitled "Report on amendment No. 1 of the official plan", the court finds that the property owners over whose land an easement for a pipe line is necessary who did not file any exception to said report of said board of appraisers and who did not file any exception to the appraisal to the valuation of the right-of-way and of said easement and damages to the remainder of said property within ten (10) days after the last publication as made herein on hearing of the appraisers' report are as follows:

Burton L. and Charlotte E. Hilles, whose property is described as line 4, as set forth on page 4 of said appraisers' report; Warren W. and Louise Clarkson, whose property is described as lines 9, 10, and 11, as set forth on page 4 of said appraisers' report; Todd C. Barringer, whose property is described as lines 19 and 20, as set forth on page 5 of said appraisers' report; Walter and Flossie Gault, whose property is described as lines 22, 23 and 24, as set forth on page 5 of said appraisers' report; Thelma G. Moherman, whose property is described as line 25, as set forth on page 5 of said appraisers' report; Joyce I. Speece, whose property is described as line 27, as set forth on page 5 of said appraisers' report; Esther F. Barrett, whose property is described as line 34, as set forth on page 6 of said appraisers' report; and that by reason of the failure of said owners of property to file said exceptions, the court orders, adjudges and decrees that said property owners be and are hereby ordered to execute to said the Mahoning Valley Sanitary District an easement for a pipe line, right-of-way on said property, sixty foot in width,—which right-of-way or easement shall be substantially in the form as set forth on pages 18, 19 and 20 of said report of the board of appraisers; and that said property owners be compensated

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according to the appraised value of said right-of-way and damages to the residue as set forth in said report of said board of appraisers.

10. The court finds that all of the remaining owners of property, as listed on pages 4, 5 and 6 of said report of the board of appraisers, did within statutory time file objections and exceptions to the appraised value of the compensation to be given for said right-of-way and damages to the residue of said property; and that by reason thereof said the Mahoning Valley Sanitary District be and is hereby authorized by means of eminent domain or appropriation said easement or right-of-way over the properties above described or to make adjustment or settlement with said property owners,—all of which shall be hereafter reported to this court.

11. It is further ordered, adjudged and decreed that said property owners, who have filed their objections as above set forth, may within ten (10) days from date of the within entry file with the clerk of the Court of Common Pleas, Mahoning county, Ohio, a written notice, making demand for a jury trial and shall at the same time file a bond with good and sufficient security to be approved by said clerk in the sum of $200.00 to the effect and condition that if the appellant does not recover more by the verdict of the jury than the sum awarded him by the appraisers or if the verdict is not more favorable to him, he will pay the costs of the appeal. It is further ordered, adjudged and decreed that each of said property owners, if they appeal, shall state definitely from what part of the order for award of compensation or damages he appeals.

12. The court now comes to consider that portion of the report of the board of appraisers on amendment No. 1 of the official plan wherein the board of appraisers determined that such areas outside of the two municipalities constitut-

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ing the district, to which sales of water are made by the member cities, should not be made a part of the Mahoning Valley Sanitary District,—which conclusion the court approves. It is, therefore, adjudged and decreed that that portion of the report of the board of appraisers, wherein they conclude that the areas outside the two municipalities, to which areas said municipalities sell water, should not be included in the district be and is hereby approved.

13. Coming now to consider that portion of the report of the board of appraisers wherein the board of appraisers determine that none of the territory outside of the boundaries of the original district should be assessed,—the court approves said conclusion. Wherefore, it is ordered, adjudged and decreed that that portion of the report of the board of appraisers wherein they conclude that none of the territory outside of the original district be assessed or taxed for benefits be and is hereby approved.

14. The court now comes to consider that portion of the report of the board of appraisers as to the division of costs between the member cities of the carrying out of amendment No. 1 to the official plan. The court has heretofore ordered said board of appraisers to re-cast and amend their recommendation on such subject matter as made in their original report,—which amendment or re-cast, concurred in by all members of the board of appraisers, has been filed with the clerk of the Court of Common Pleas. This court unanimously approves and confirms the above-mentioned amendment or re-cast of the sanitary district appraisal record on amendment No. 1 of the official plan; and it is hereby ordered, adjudged and decreed that the apportionment of total benefits for the construction of amendment No. 1 to the official plan as between the member cities shall be allocated through the comparison of two factors, to wit:

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First. Tax valuation as reflected by the duplicates of the two cities.

Second. Water consumption of the two cities.

For the purpose of comparison, those tax duplicates of the two cities shall be used which reflect the latest appraisal approved by the state tax commission previous to the year of levy. For the purpose of comparing water consumption of the two cities, the total consumption of each city for the calendar year shall be adopted; this to include each city's surplus water sold to the village of McDonald. Thirty-six per cent (36%) of the total benefits shall be allocated in accordance with the tax duplicates of the two cities and sixty-four (64%) of the total benefits shall be allocated in accordance with water consumption of the two cities. Using the 1949 tax duplicate of both cities as a basis it is indicated that Youngstown tax duplicate is 91.9% of the total amount, and Niles is 8.1% of the total amount. Using an average total water consumption by the two cities for the five year period, 1946 to 1950, both inclusive, (including each city's surplus water sold to McDonald) it is shown that the Youngstown consumption was 76.2% of the total and Niles was 23.8% of the total. The result of using the foregoing allocations and percentages is as follows:

City	From Tax Duplicates 36% of Total	From Consumption 64% of Total	Total Benefit Percentages
Youngstown	91.9%=33.084%	76.2%=48.768%	81.852
Niles	8.1%= 2.916%	23.8%=15.230%	18.148
	36.000%	64.000%	100.000

This calculation results in the apportionment of benefits to the member cities as follows:

Youngstown	81.852%
Niles	18.148%

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These percentages shall prevail for the first year of levy to be made upon the two cities for retirement of the first bond issue by the district for the construction of amendment No. 1 of the official plan. All subsequent levies for the bond requirements of the district for completion of amendment No. 1 shall be made by the same formula except the water consumption percentages for each levy shall be the average water consumption of the two member cities (including the water sold to McDonald) for the two calendar years immediately preceding the year in which the levy is made. In all cases the tax duplicate figures used in the formula shall be those given by the latest appraisal of the two cities approved by the state tax commission previous to the year of levy.

15. The court now comes to consider as to how the surplus funds now on hand with the Mahoning Valley Sanitary District should be credited on the indebtedness and cost incurred in the construction of amendment No. 1. The court concludes that the surplus funds of the Mahoning Valley Sanitary District may be used as the board of directors may determine for any lawful purpose of the district; that it is proper to apply said surplus or so much thereof as the board of directors may determine in the exercise of their discretion to the construction of amendment No. 1 to the official plan; and that such surplus fund is a legally created fund belonging to the Mahoning Valley Sanitary District.

16. The court finds that the total cost of the construction and carrying out of amendment No. 1 to the official plan will be substantially six million dollars; and that benefits to be derived from the construction of said benefits to the member cities will be at least twelve million dollars. It is, therefore, ordered, adjudged and decreed that the report of the board of appraisers on amendment No. 1 of

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the official plan as re-cast and amended on the appraisement of total benefits as between the member cities be and is hereby approved and said the Mahoning Valley Sanitary District be and is hereby authorized to issue bonds for the cost of construction of amendment No. 1 to the official plan in a sum not exceeding six million dollars.

17. The court, having heard and determined all of the exceptions to the reports of the board of appraisers as originally filed herein and as amended and re-cast on the subject of the apportionment of total benefits as between the member cities does hereby overrule all of said exceptions; and the court finds that the estimated cost of constructing amendment No. 1 to the official plan is less than the benefits appraised and herein approved and confirmed; that the said amendment No. 1 of the official plan is effective for the purposes of said district and is suited to the requirements of said district. And the court, having considered all appraisals of the values for purchase of lands and other property to be acquired, the values of easements, the amount of damages to the property affected,—as included in the "Report on amendment No. 1 of the official plan" together with maps attached thereto and incorporated therein and the form of right-of-way easement proposed for Berlin-Meander pipe lines,—does hereby overrule all exceptions and hereby confirms and approves said appraisers' report together with the re-cast and amendment of said report above referred to.

18. It is further ordered, adjudged and decreed that the clerk of this court is hereby ordered to transmit to the secretary of the board of directors of the Mahoning Valley Sanitary District a certified copy of this decree and of all appraisals as confirmed by this court, except those parts from which appeals shall have been perfected but not determined,—such copy to be transmitted after a period of ten

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(10) days from the entering of this order, the time allowed by law for such appeals to be perfected.

19. Exceptions to all of the foregoing judgments, orders and decrees be and are hereby allowed to the city of Youngstown, the city of Niles, The Ohio Water Service Company, Rose E. Spagnola, et al., and to all other objectors and exceptors, and to each of the property owners whose names are listed on pages 4, 5 and 6 of said "the sanitary district appraisal record—report on amendment No. 1 of the official plan".

Order Setting Aside Entry of September 29, 1952.

December 10, 1952. This day the above cause came on to be heard before the court of jurisdiction, composed of Hon. Clifford L. Belt of Belmont county, Ohio, duly designated and appointed as a member of the court by order of the Chief Justice of the Supreme Court of Ohio, Hon. G. H. Birrell, judge of the Court of Common Pleas, Trumbull county, Ohio,—and Hon. E. Maiden, Jr., judge of the Court of Common Pleas of Mahoning county, Ohio.

A hearing was had upon the motions for new trial as herein filed by Rose E. Spagnola, et al., The Ohio Water Service Company, and the city of Niles, Trumbull county, Ohio, William B. Spagnola, counsel for Rose E. Spagnola, et al., moved the court for leave to withdraw the motion for new trial as herein filed by Rose E. Spagnola, et al.,—which motion was allowed and said motion for new trial is withdrawn and dismissed.

The motion as herein filed by the Mahoning Valley Sanitary District to strike the motions for new trial as herein filed by Rose E. Spagnola, et al., The Ohio Water Service Company, and the city of Niles, Trumbull county, Ohio, be and is hereby overruled and exceptions noted.

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The court then came on to consider the motion as herein filed by the Mahoning Valley Sanitary District to strike the notice of appeal as herein filed by Rose E. Spagnola, et al. It is hereby ordered, adjudged and decreed that said motion to strike be and is hereby overruled and exceptions noted,—this court not being required to pass on the validity of any notice of appeal.

The court desiring to reconsider the apportionment of total benefits of amendment No. 1 as between the city of Youngstown, Mahoning county, Ohio, and the city of Niles, Trumbull county, Ohio, in order to avoid in so far as possible any variable or fluctuating factors in determining the apportionment of such benefits between said member cities, does hereby set aside and hold for naught the journal entry of this court herein filed September 29, 1952, and takes the subject matter of apportionment of total benefits between the member cities under advisement and further consideration. The court retaining full jurisdiction of the entire subject matter embraced in said journal entry of September 29, 1952, returns to the board of appraisers of the Mahoning Valley Sanitary District for further consideration and report that portion of its report entitled "Apportionment of total benefits between the member cities" and requests further recast and amendment and report from the board of appraisers,—which recast shall apportion the total benefits of the construction of amendment No. 1 as between said member cities in such a way as will avoid in so far as possible any variable or fluctuating factors during the life of the bonds to be issued to pay for the improvements in said amendment No. 1, or for a period of approximately twenty (20) years.

The court recommends that in considering the various factors bearing upon the allocation of benefits as between

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the member cities, the appraisers give consideration to a former determination of this court in which the item of tax values of the two cities was given an allocation weight of thirty-six per cent (36%) and the item of water consumption was given an allocation weight of sixty-four per cent (64%). The court specifically directs the board of appraisers that they are to allocate the total benefits arising from amendment No. 1 of the official plan as between the member cities in such manner as they deem best, just and equitable under the facts as they find them to exist.

Because of the extreme necessity for the improvements included in amendment No. 1, the court requests that unnecessary delays be avoided and that the report be returned to this court at an early date.

Order Designating Successor Judge.

December 22, 1952. The Court of Common Pleas of Mahoning county, Ohio, finds that Hon. E. Maiden, Jr., is, by reason of temporary disability, unable to serve as a member of the court of jurisdiction of the Mahoning Valley Sanitary District; and that by reason of certain litigation pending before said court of jurisdiction it is necessary to appoint temporarily a successor to said Hon. E. Maiden, Jr.

It is, therefore, ordered, adjudged and decreed that subject to further order of the court, Hon. Harold B. Doyle, member of the Court of Common Pleas of Mahoning county, Ohio, be and is hereby designated as a member of said the Mahoning Valley Sanitary District court of jurisdiction to serve as such, as a member from Mahoning county, Ohio, until further order of court.

Dated this twenty-second day of December, A. D. 1952.

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Order Approving and Confirming Appraisers' Report as Recast.

March 19, 1953. 1. This day the above cause came on to be heard upon two reports of the board of appraisers of the Mahoning Valley Sanitary District: The first report being entitled "Review of appraisal of benefits as between the member cities on account of construction of official plan of district",—and the second report being entitled "Report on amendment No. 1 of the official plan". Said hearing was also had upon the second amendment or recast of the sanitary district appraisal record on amendment No. 1 of the official plan, which recast was signed under date of December 10, 1952.

2. The court finds that all proper parties have been served as required by law; that due and proper advertisement of said hearing has been made as required by Section 6602-63 of the General Code of Ohio; that the cities of Niles and Youngstown have filed exceptions and objections to said reports; and that The Ohio Water Service Company and Rose E. Spagnola, et al. have both filed objections and exceptions to said reports.

3. The court finds that it has full and complete jurisdiction to hear and determine all matters involved herein and has jurisdiction over all parties interested herein.

4. The court finds that said reports of said appraisers and the first and second amendment or recast as made by said board of appraisers have been signed and approved by at least a majority of the members of said board of appraisers and deposited with the clerk of this court and by him filed in this cause; that the board of appraisers by its secretary gave due notice of said report of the board of appraisers by registered mail or personal service to owners of the various properties affected by the appraisal of com-

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pensation and damages, and to the mayor and the city council of each of said cities to which benefits had been appraised, to wit: the city of Youngstown, Mahoning county, Ohio, and the city of Niles, Trumbull county, Ohio.

5. The court comes now to consider the report of the board of appraisers entitled "Report on review of appraisal of benefits as between the member cities on account of construction of official plan of district",—which report was concurred in by all members of the board of appraisers. It is, hereby, ordered. adjudged and decreed that said report be and is hereby approved.

6. The court finds that the original method of allocation of costs between the member cities of the district for jointly used facilities was apportioned by a formula taking into consideration tax valuation and population,—giving equal weight to each; that during the last twenty years the ratio of valuation and population has changed but little. Some years results obtained by the use of this formula have favored one member and then the other. The amount by which either has been favored, however, is minor when considered in the light of the entire project; and each member city of the district has attained many fixed benefits because of the availability of an unrestricted supply of pure, soft and potable water to be used for any purpose which they may desire.

7. The court finds that in said report the board of appraisers recommends that the board of directors of the Mahoning Valley Sanitary District adopt such procedure as shall in effect relieve the city of Youngstown from the payment of $120,638.97 now standing delinquent from the 1932 levy against the city of Youngstown; and that otherwise the remaining levies against the member cities stand as originally determined. This court in the opinion of all

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of its members finds that it has no jurisdiction whatever to cancel this delinqency.

8. Coming now to consider the report of the board of appraisers entitled "Report on amendment No. 1 of the official plan", the court finds that the property owners over whose land an easement for a pipe line is necessary who did not file any exception to said report of said board of appraisers and who did not file any exception to the appraisal to the valuation of the right-of-way and of said easement and damages to the remainder of said property within ten (10) days after the last publication as made herein on hearing of the appraisers' report are as follows:

Burton L. and Charlotte E. Hilles, whose property is described as line 4, as set forth on page 4 of said appraisers' report; Warren W. and Louise Clarkson, whose property is described as lines 9, 10, and 11, as set forth on page 4 of said appraisers' report; Todd C. Barringer, whose property is described as lines 19 and 20, as set forth on page 5 of said appraisers' report; Walter and Flossie Gault, whose property is described as lines 22, 23 and 24, as set forth on page 5 of said appraisers' report; Thelma G. Moherman, whose report is described as line 25, as set forth on page 5 of said appraisers' report; Joyce I. Speece, whose property is described as line 27, as set forth on page 5 of said appraisers' report; Esther F. Barrett, whose property is described as line 34, as set forth on page 6 of said appraisers' report; and that by reason of the failure of said owners of property to file said exceptions, the court orders, adjudges and decrees that said property owners be and are hereby ordered to execute to said the Mahoning Valley Sanitary District an easement free of an encumbrance for a pipe line, right-of-way on said property, sixty foot in width, which right-of-way or easement shall be substan-

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tially in the form as set forth on pages 18, 19 and 20 of said report of the board of appraisers; and that said property owners be compensated according to the appraised value of said right-of-way and damages to the residue as set forth in said report of said board of appraisers.

9. The court finds that all of the remaining owners of property, as listed on pages 4, 5 and 6 of said report of the board of appraisers, did within statutory time file objections and exceptions to the appraised value of the compensation to be given for said right-of-way and damages to the residue of said property; and that by reason thereof said the Mahoning Valley Sanitary District be and is hereby authorized to obtain by means of eminent domain or appropriation said easement or right-of-way over the properties above described or to make adjustment and settlement with said property owners,—all of which shall be hereafter reported to this court.

10. It is further ordered, adjudged and decreed that said property owners, who have filed their objections as above set forth, may within ten (10) days from date of the within entry file with the clerk of the Court of Common Pleas, Mahoning county, Ohio, a written notice, making demand for a jury trial and shall at the same time file a bond with good and sufficient security to be approved by said clerk in the sum of $200.00 to the effect and condition that if the appellant does not recover more by the verdict of the jury than the sum awarded him by the appraisers or if the verdict is not more favorable to him, he will pay the costs of the appeal. It is further ordered, adjudged and decreed that each of said property owners, if they appeal, shall state definitely from what part of the order for award of compensation or damage he appeals.

11. The court now comes to consider that portion of the report of the board of appraisers on amendment No. 1 of

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the official plan wherein the board of appraisers determined that any areas outside of the two municipalities constituting the district, to which sales of water are or have been made by the member cities, should not be made a part of the Mahoning Valley Sanitary District,—which conclusion the court approves. It is, therefore, adjudged and decreed that that portion of the report of the board of appraisers, wherein they conclude that the areas outside the two municipalities, to which areas said municipalities sell water, should not be included in the district be and is hereby approved.

12. The court now comes to consider that portion of the report of the board of appraisers as to the division of costs between the member cities of the carrying out of amendment No. 1 to the official plan. The court has heretofore twice ordered said board of appraisers to re-cast and amend their recommendation on such subject matter as made in their original report,—which amendments or re-casts concurred in by all members of the board of appraisers, have been filed with the clerk of the Court of Common Pleas. This court unanimously approves and confirms the above-mentioned second amendment or re-cast of the sanitary district appraisal record on amendment No. 1 of the official plan, bearing date of December 10, 1952; and it is hereby ordered, adjudged and decreed that the apportionment of total benefits for the construction of amendment No. 1 to the official plan as between the member cities shall be allocated as follows, to wit: to the city of Youngstown—83%; to the city of Niles—17%.

13. The court finds that the total cost of the construction and carrying out of amendment No. 1 to the official plan will be substantially six million dollars; and that the benefits to be derived from the construction of said benefits

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to the member cities will be at least twelve million dollars. It is, therefore, ordered, adjudged and decreed that the report of the board of appraisers on amendment No. 1 of the official plan as re-cast and amended on the appraisement of total benefits as between the member cities be and is hereby approved and said the Mahoning Valley Sanitary District be and is hereby authorized to issue bonds for the cost of construction of amendment No. 1 to the official plan in a sum not exceeding six million dollars.

14. The court, having heard and determined all of the exceptions to the reports of the board of appraisers as originally filed herein, and as amended and re-cast on the subject of the apportionment of total benefits as between the member cities does hereby overrule all of said exceptions; and the court finds that the estimated cost of construction of amendment No. 1 to the official plan is less than the benefits appraised and is hereby approved and confirmed; that the said amendment No. 1 to the official plan is effective for the purposes of said district and is suited to the requirements of said district. And the court, having considered all appraisals of the values for purchase of lands and other property to be acquired, the values of easements, the amount of damages to the property affected,—as included in the "Report on amendment No. 1 of the official plan" together with maps attached thereto and incorporated therein and the form of right-of-way easement proposed for Berlin-Meander pipe lines,—does hereby overrule all exceptions and hereby confirms and approves said appraisers' report together with the second amendment or re-cast of said report above referred to.

15. It is further ordered, adjudged and decreed that all motions for new trial heretofore filed herein or that may be filed herein hereafter be and are hereby overruled.

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16. It is further ordered, adjudged and decreed that the clerk of this court is hereby ordered to transmit to the secretary of the board of directors of the Mahoning Valley Sanitary District a certified copy of this decree and of all appraisals as confirmed by this court, except those parts from which appeals shall have been perfected but not determined,—such copy to be transmitted after a period of ten (10) days from the entering of this order, the time allowed by law and for such appeals to be perfected.

17. Exceptions to all of the foregoing judgment, orders and decrees be and are hereby allowed to the city of Youngstown, the city of Niles, The Ohio Water Service Company, Rose E. Spagnola, et al., and to all other objectors and exceptors, and to each of the property owners whose names are listed on pages 4, 5 and 6 of said "the sanitary district appraisal record—report on amendment No. 1 of the official plan."

[Duly certified.]

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IN THE COURT OF APPEALS OF MAHONING COUNTY, OHIO.

IN THE MATTER OF THE MAHONING VALLEY SANITARY DISTRICT.

Ohio Water Service Company, Appellant,
vs.
The Mahoning Valley Sanitary District, Appellee.
No. 3593.

Ohio Water Service Company, Appellant,
vs.
The Mahoning Valley Sanitary District, Appellee.
No. 3594.

ASSIGNMENTS OF ERROR.

(Case No. 3593.)

[Filed May 15, 1953.]

The exceptor-appellant for its assignments of error herein says that there is error in the record and proceedings of the court of jurisdiction prejudicial to the rights of the appellant herein, to wit:

1. The special Common Pleas Court having jurisdiction of the Mahoning Valley Sanitary District (hereinafter

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known as the "court of jurisdiction") erred in approving a second amended report of the board of appraisers of the district, which report failed to include any appraisal of benefits to lands outside the district which will benefit from amendment No. 1 of the official plan of the Mahoning Valley Sanitary District.

2. The court of jurisdiction erred in approving that portion of the report of the board of appraisers wherein the board determined that areas outside the district to which sales of water are, or have been, made by the member cities of the district (that is, Youngstown and Niles) should not be included in the district.

3. The court of jurisdiction erred in failing and refusing to direct the board of appraisers to appraise benefits to all lands outside the district which are now benefiting from the district and which will benefit from amendment No. 1.

4. The court of jurisdiction erred in apportioning the total benefits from the construction of amendment No. 1 between Youngstown and Niles on the basis of 83% to Youngstown and 17% to Niles.

5. The court of jurisdiction erred in finding that the costs of amendment No. 1 will be substantially $6,000,000 and that the benefits to be derived therefrom to Youngstown and Niles will be at least $12,000,000.

6. The court of jurisdiction erred in imposing assessments upon this appellant for the construction of facilities to benefit property owners not assessed; that the decree of said court deprives this appellant of its property without due process of law and also deprives it of the equal protection of the laws, all in violation of those rights secured to appellant by the Constitution of the state of Ohio and the Constitution of the United States of America.

JAMES E. MITCHELL,
Counsel for Exceptor-Appellant.

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ASSIGNMENTS OF ERROR.

(Case No. 3594.)

[Filed May 15, 1953.]

The exceptor-appellant for its assignments of error herein says that there is error in the record and proceedings of the court of jurisdiction prejudicial to the rights of the appellant herein, to wit:

1. The court of jurisdiction erred in approving that portion of the report of the board of appraisers finding that areas outside the Mahoning Valley Sanitary District receiving sanitary district water should neither be included in the district nor assessed for benefits which will accrue to them from Amendment No. 1 of the official plan of the Mahoning Valley Sanitary District.

2. The court of jurisdiction erred in decreeing that the total benefits for the construction of Amendment No. 1 of the official plan be appraised exclusively to the cities of Niles and Youngstown and the properties lying therein (including the properties of this appellant).

3. The court of jurisdiction erred in decreeing that the apportionment of the total benefits for the construction of Amendment No. 1 of the official plan as between Niles and Youngstown be allocated on a comparison of two factors: (1) Tax valuation as reflected by the duplicates of the two cities; and, (2) Water consumption of the two cities, and that each year the levy against said cities (including the properties of this appellant) be determined by inserting into a special and arbitrary formula established by the court, current figures of water consumption and property valuation in the two cities.

4. The court of jurisdiction erred in finding that benefits of at least $12,000,000 will accrue from the construction of Amendment No. 1 of the official plan of the Mahoning

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Valley Sanitary District to the cities of Niles and Youngstown; that said benefits are in excess of the costs of Amendment No. 1; and in directing that the district may issue bonds in a sum not exceeding $6,000,000.

5. The court of jurisdiction erred in finding that the benefits which will accrue from Amendment No. 1 to the official plan of the Mahoning Valley Sanitary District to the properties situated within the boundaries of the district are in excess of the estimated cost of said Amendment No. 1.

6. The court of jurisdiction erred in imposing assessments upon this appellant for the construction of facilities to benefit property owners not assessed; that the decree of said court deprives this appellant of its property without due process of law and also deprives it of the equal protection of the laws, all in violation of those rights secured to appellant by the Constitution of the state of Ohio and the Constitution of the United States of America.

JAMES E. MITCHELL,
Counsel for Exceptor-Appellant.

OPINION OF COURT OF APPEALS.

(Decided July 27, 1953.)

(The following opinion was rendered in Cases Nos. 3593, 3594, 3595, 3596, 3597.)

Per Curiam:

There is no right of appeal in any case unless provided by the Constitution or legislative act. See opinion in the case of Corn, d.b.a. Colonial Inn Restaurant, appellant, v. Board of Liquor Control, et al., appellees, 160 Ohio St., 9.

The Constitution of Ohio, Article 4, Section 6, provides as follows:

"The courts of appeals shall have original jurisdiction in quo warranto, mandamus, habeas corpus, pro-

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hibition and procedendo, and appellate jurisdiction in the trial of chancery cases, and, to review, affirm, modify, or reverse the judgments of the courts of common pleas, superior courts and other courts of record within the district as may be provided by law. * * *."

The legislature in Section 12223-3, of the General Code, has provided as follows:

"Every final order, judgment or decree of a court and, when provided by law, the final order of any administrative officer, tribunal, or commission may be reviewed as hereinafter provided, unless otherwise provided by law, * * *."

In the special legislation under which the Mahoning Valley Sanitary District was established the legislature by Section 6602-65, General Code, provided:

"If it appears to the satisfaction of the court after having heard and determined all said exceptions that the estimated cost of constructing the improvement contemplated in the official plan is less than the benefits appraised, then the court shall approve and confirm said appraisers' report as so modified and amended, and such findings and appraisals shall be final and incontestable. * * *."

The jurisdictional court found that the estimated cost of the improvement is less than the benefits appraised.

However, the legislature by Section 6602-66, General Code, has provided: "Any person, or public or private corporation desiring to appeal from an award as to compensation or damages, shall within ten days from the judgment of the court confirming the report of the appraisers, file with the clerk of the court a written notice making demand for a jury trial", and shall give bond as therein provided. This section further specifically provides as follows:

"The appeal shall be from the award of compensation or damages, or both of them, but from no other part of the decree of the court."

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Thus the legislature has specifically prescribed that the decree of the court is final and incontestable except from an award for compensation or damages. The jurisdictional court has made no award for compensation or damages to any of the appellants, and it follows that there is no right of appeal in these cases now before us, and such appeals, being numbered 3593, 3594, 3595, 3596, and 3597, are hereby dismissed.

The holding of this court is in accord with that of case number 3565, Mahoning county, entitled Rose E. Spagnola, et al., exceptors-appellants, v. The Mahoning Valley Sanitary District, defendant-appellee, now pending in the Supreme Court after the allowance of a motion to certify.

Appeals numbers 3593, 3594, 3595, 3596, and 3597 dismissed. Exceptions.

Griffith, P. J., concurs.

Phillips, J., concurs.

Nichols, J., concurs.

TRANSCRIPT OF DOCKET ENTRIES, COURT OF APPEALS.

(Cases Nos. 3593 and 3594.)

(The docket entries in Cases Nos. 3593 and 3594 are identical.)

1953, March 28. Transcript and original papers filed.

1953, May 11. Partial bill of exceptions with all exhibits filed.

1953, May 15. Three assignments of error and brief of exceptor-appellant filed.

1953, June 11. Three briefs of the Mahoning Valley Sanitary District filed.

1953, June 18. Three reply briefs filed.

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1953, June 18. Three reply briefs of plaintiff-appellant (city of Niles, Ohio) filed.

1953, July 27. Hearing: Appeal dismissed. Judgment vs. appellant for costs. Exceptions allowed.

1953, August 12. Notice of appeal filed.

1953, August 12. Precipe filed.

TRANSCRIPT OF JOURNAL ENTRY, COURT OF APPEALS.

(The journal entry in Cases Nos. 3593 and 3594 is identical.)

Order Dismissing Appeal.

July 27, 1953. This day the above cause came on to be heard upon appeal as to questions of law.

Arguments having been presented and the court, being fully advised in the premises, finds that by reason of Sections 6602-65 and 6602-66 of the Sanitary District Act of Ohio, no appeal is available to appellants herein; and that by reason thereof this court is without jurisdiction to hear the above cause upon appeal.

Wherefore, it is ordered, adjudged and decreed that the appeal herein be and is hereby dismissed at the costs of appellant. Exceptions allowed.

[Duly certified.]

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IN THE SUPREME COURT OF OHIO

IN THE MATTER OF THE MAHONING VALLEY SANITARY DISTRICT.

Ohio Water Service Company,
Appellant,
vs.
The Mahoning Valley Sanitary District,
Appellee.
No. 33688.

Ohio Water Service Company,
Appellant,
vs.
The Mahoning Valley Sanitary District,
Appellee.
No. 33689.

NOTICE OF APPEAL.

[Filed August 12, 1953.]

(The following notice of appeal was filed in both Cases Nos. 33688 and 33689.)

The above named appellant hereby gives notice of appeal to the Supreme Court of Ohio on questions of law by reason of the constitutional question involved, and on condition that a motion to certify be allowed by the Supreme Court from the judgment and final order rendered herein by the

Court of Appeals of Mahoning county on the twenty-seventh day of July, 1953.

JAMES E. MITCHELL,
MITCHELL, MITCHELL & REED,
Counsel for Exceptor-Appellant.

MOTION FOR ORDER DIRECTING COURT OF APPEALS TO CERTIFY RECORD.

[Filed August 12, 1953.]

(The following motion to certify record was filed in both Cases Nos. 33688 and 33689.)

Now comes the Ohio Water Service Company, the exceptor-appellant herein, and represents that on the twenty-seventh day of July, 1953, in an action pending in the Court of Appeals wherein this appellant was the appellant and the appellee herein was the appellee, said court rendered a decree in favor of the appellee and against the exceptor-appellant, dismissing the appeal on the ground that G. C. Sections 6602-65 and 66 deny the appellant the right to appeal. Nine copies of a printed brief containing a statement of the questions presented, a statement of the case, assignments of error, copy of the journal entry of the Court of Appeals, and copies of all opinions rendered in the case, as required by the rules of this court, have been filed herewith.

Exceptor-appellant further represents that it has heretofore filed notice of appeal in the Court of Appeals of Mahoning county, and a similar notice of appeal in this court, as required by law, and further that said case is one of both public and general interest, and prejudicial error has interfered in the proceedings in said Court of Appeals and by reason thereof this honorable court has jurisdiction to and ought to review said judgment.

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Wherefore, said exceptor-appellant makes application for an order directing said Court of Appeals of Mahoning county, seventh District, to certify its record in the Supreme Court of the state of Ohio.

JAMES E. MITCHELL,
MITCHELL, MITCHELL & REED,
Counsel for Exceptor-Appellant.

MOTION OF RESPONDENTS TO DISMISS APPEAL AS A MATTER OF RIGHT.

[Filed October 13, 1953.]

(The following motion to dismiss appeal was filed in both Cases Nos. 33688 and 33689.)

Now comes the defendent-appellee and respectfully moves the court to dismiss the appeal herein insofar as made as a matter of right, on the ground and for the reason that there is no debatable constitutional question involved.

W. P. BARNUM,
Attorney for the Mahoning Valley Sanitary District,
Defendant-Appellee.

ASSIGNMENTS OF ERROR.

(Case No. 33688.)

[Filed November 12, 1953.]

The appellant for its assignments of error in this cause, committed to the prejudice of this appellant by the Court of Appeals, states the following:

I.

The Court of Appeals erred in dismissing the appellant's appeal from the decree of the court having jurisdiction of The Mahoning Valley Sanitary District, entered on Sep-

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tember 29, 1952, overruling the appellant's exceptions and objections, as a property owner, to the appraisal of benefits deemed to accrue to its property from certain new facilities of The Mahoning Valley Sanitary District.

II.

The Court of Appeals erred in dismissing the appellant's appeal from the aforementioned decree, which it did on the ground that General Code Sections 6602-65 and 6602-66 (Revised Code Sections 6115.36 and 6115.37) limit the right of appeal to those exceptors who have objected to the appraisers' award of compensation and damages and deny the right of appeal to those exceptors who have objected to the appraisal of benefits.

III.

The Court of Appeals erred in dismissing the appellant's appeal from the aformentioned decree rather than setting aside said decree, which it should have done on the ground that the reports of the board of appraisers, approved by said decree, did not comply with law in that the board of appraisers failed to appraise benefits to lands outside the district which will benefit from the district's proposed new facilities.

IV.

The Court of Appeals erred in dismissing the appellant's appeal from the aforementioned decree rather than setting aside said decree, which it should have done for the reason that it will result in the taking of appellant's property for a public purpose without the payment of just compensation, and is a denial to the appellant of the equal protection of the laws.

V.

The Court of Appeals erred in dismissing the appellant's appeal from the aforementioned decree rather than setting

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aside the decree which was entered on the nineteenth day of March, 1953, on the ground that the court was without authority to enter said decree of March 19, 1953, as it is a court of special and limited jurisdiction.

MITCHELL, MITCHELL & REED,
DUNBAR, DUNBAR & KIENZLE,
Attorneys for Appellant.

ASSIGNMENTS OF ERROR.

[Filed November 12, 1953.]

(Case No. 33689.)

The appellant for its assignments of error in this cause, committed to the prejudice of this appellant by the Court of Appeals, states the following:

I.

The Court of Appeals erred in dismissing the appellant's appeal from the decree of the court having jurisdiction of The Mahoning Valley Sanitary District, entered on March 19, 1953, overruling the appellant's exceptions and objections, as a property owner, to the appraisal of benefits deemed to accrue to its property from certain new facilities of The Mahoning Valley Sanitary District.

II.

The Court of Appeals erred in dismissing the appellant's appeal from the aforementioned decree, which it did on the ground that General Code Sections 6602-65 and 6602-66 (Revised Code Sections 6115.36 and 6115.37) limit the right of appeal to those exceptors who have objected to the appraisers' award of compensation and damages and deny the right of appeal to those exceptors who have objected to the appraisal of benefits.

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III.

The Court of Appeals erred in dismissing the appellant's appeal fro mthe aforementioned decree rather than setting aside said decree, which it should have done on the ground that the reports of the board of appraisers, approved by said decree, did not comply with law in that the board of appraisers failed to appraise benefits to lands outside the district which will benefit from the district's proposed new facilities.

IV.

The Court of Appeals erred in dismissing the appellant's appeal from the aforementioned decree rather than setting aside said decree, which it should have done for the reason that it will result in the taking of appellant's property for a public purpose without the payment of just compensation, and is a denial to the appellant of the equal protection of the laws.

MITCHELL, MITCHELL & REED,
DUNBAR, DUNBAR & KIENZLE,
Attorneys for Appellant.

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OPINION OF OHIO SUPREME COURT.

[Decided March 31, 1954.]

(The following opinion was rendered in Cases Nos. 33549, 33688, 33689, 33690, 33691 and 33692.)

Syllabus.

(Under the Rules of Practice of the Ohio Supreme Court, the syllabus is prepared by the judge assigned to write the opinion, is approved by all concurring judges and is a statement of the law of the case.)

1. The court provided for by the Sanitary District Act is one vested with judicial powers, and its findings are judicial in nature.

2. There is no inherent right of appeal from a judgment of a court, and such right must be conferred by constitution or statute.

3. Under Section 6 of Article IV of the Ohio Constitution and Section 12223-3, General Code (Section 2505.03, Revised Code), unless otherwise provided by law, every final order, judgment, or decree of a court may be reviewed as provided in Sections 12223-4 to 12223-47, General Code (Sections 2505.04 to 2505.45, Revised Code).

4. Section 6602-65, General Code (Section 6115.36, Revised Code), provides that approval by a sanitary district court of the provisions of a report of a board of appraisers of a sanitary district, as modified and amended, makes the findings and appraisals comprising such report final and incontestable, and Section 6602-66, General Code (Section 6115.37, Revised Code), prohibits an appeal from any part of the decree of such court except an appeal for a jury trial from an award of compensation or damages, or both.

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5. A prohibition of an appeal as provided by statute comes within the term, "otherwise provided by law," in Section 12223-3, General Code (Section 2505.03, Revised Code).

Appeals from the Court of Appeals for Mahoning County.

The Mahoning Valley Sanitary District, organized under Sections 6602-34 to 6602-106, General Code (Sections 6115.01 to 6115.99, Revised Code), consists of the city of Youngstown in Mahoning county and the city of Niles in Trumbull county and has been in operation since originally organized in 1926.

With the approval of the court, set up under the foregoing statutes, a plan, denominated amendment No. 1 of the official plan of the Mahoning Valley Sanitary District, was enacted May 10, 1950, and a board of appraisers was thereupon appointed as required by Section 6602-58, General Code (Section 6115.29, Revised Code), for the purpose of valuing the land to be taken for and damaged by the facility and for the purpose of valuing the benefits which would accrue therefrom.

The amendment is designed to augment the supply of water for the district from what is known as Berlin reservoir, which is maintained and operated by the United States Army, and will require a pipe line of about nine miles between the Berlin reservoir and the district's reservoir and an enlargement of the district's facilities, making the total cost about $6,000,000.

After extensive hearings, the board of appraisers filed an amended report, exceptions to the report were filed by each of the appellants herein, and the court, on September 29, 1952, entered an order overruling the exceptions and approving the report of the board of appraisers as amended which apportioned the benefits by allocating 36 per cent of the cost of the total improvement on the basis of the

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